[redacted]

Supreme Court of the United States

OCTOBER TERM, 19[redacted]

No. [redacted]

[redacted]

JOHN HENRY HARMON, III, PETITIONER

v.

WILBER M. BRUCKER, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF THE ARMY

On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR CERTIORARI FILED FEBRUARY 14, 1957

CERTIORARI GRANTED MAY 13, 1957

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,230

JOHN HENRY HARMON, III, *Appellant*,

v.

WILBER M. BRUCKER, individually and as Secretary of the Department of the Army, *Appellee*.

Appeal from the United States Court for the District of Columbia

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JOINT APPENDIX

(Filed May 2, 1955)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

C.A. No. 1972-55

JOHN HENRY HARMON, III, 601 East 226th Street, Bronx 66, New York, *Plaintiff*,

against

ROBERT T. STEVENS, individually and as Secretary of the Department of the Army, Washington 25, D. C., *Defendant*.

Complaint

Plaintiff, by his attorneys, complaining of the defendant, alleges that:

1. Plaintiff is a natural born citizen of the United States and is a resident of New York, New York.

2. Defendant Robert T. Stevens, is an individual doing business and residing in the District of Columbia, and is the Secretary of the Department of the Army, United States Government. Said defendant is sued individually and as Secretary of the Department of the Army.

3. Jurisdiction of this Court arises under Sections 11-305 and 11-306 of the District of Columbia Code, under 28 U.S.C., Sections 2201 and 2202, and under 5 U.S.C., Section 1009. Jurisdiction is also based on the First, Fifth and Sixth Amendments to the Constitution of the United States, and on Articles I and III thereof.

4. Plaintiff is a graduate of Bucknell College, having majored in Political Science, and intends to enter law school to prepare for and complete his legal training in order to be admitted to the Bar of the State of New York.

5. On or about the 31st day of October, 1952, plaintiff was duly inducted into the Armed Forces of the United

States Army of the United States, under and pursuant to the provisions of the Universal Military Training and Service Act of 1948, 62 Stat. 604, 50 App. U.S.C., Section 451 *et seq.*

6. On or about February 9, 1954, plaintiff who then held the rank of Private E-1, Service No. U.S. 51 207 184, was notified by the Adjutant General of the Army that by order of defendant plaintiff was to reply to certain derogatory information which had been received concerning him, to wit:

"That you—

"a. In 1951 and 1952, were employed at Camp Lakeland which was reported to be a Communist operated camp.

"b. In 1949, were employed by the Detroit Urban League which was reported to be a subversive organization.

"c. In 1952, registered to vote in New York City with the American Labor Party. The American Labor Party is cited by the House Committee on Un-American Activities as being under Communist control in New York City.

"d. Solicited contributions of money for the defense of persons under indictment for violation of the Smith Act.

"e. Have a father, John, who:

(1) Was reported to be a member of the Communist Party.

(2) Was a member of the Negro Labor Victory Committee which is cited as subversive and Communist by the Attorney General of the United States.

"(3) Was an official for the International Workers Order which is cited as subversive and Communist by the Attorney General of the United States.

(4) In 1946, was a delegate to the 10th National Negro Congress, an organization cited as subervise and Communist by the Attorney General of the United States.

(5) In 1943, was an instructor at the George Washington Carver School which is cited as an adjunct of the Communist Party by the Attorney General of the United States.

(6) In 1938, 1940, 1941, 1943-1947, 1949-1952, registered in New York City with the American Labor Party.

"f. Have a stepmother, Susie, who from 1943 to 1952, registered in New York City with the American Labor Party.

"g Associated wiht persons who were Communists or Communists sympathizers."

7. On or about March 11, 1954, plaintiff replied as follows:

"Alleg: a) Employment at Camp Lakeland, summers of 1951-52.

Ans: a) To the best of my knowledge, Camp Lakeland caters to lower-incoming working class people. At the time of my employment there, Camp Lakeland was primarily patronized by Jewish people. However, the camp's management actively encouraged the patronage of all working class peoples, Negroes included. It is quite reasonable to assume that any person or groups of persons hostile to the idea of inter-group relations, would attempt to detract from the camp's efforts by labelling it as communist dominated.

I was employed at Camp Lakeland in 1951 as a kitchen-helper, and in 1952 as ass't breakfast cook.

"(Alleg: b) Employment by the Detroit Urban League in summer of 1949.

Ans: b) I was employed by the Detroit Urban League in the summer of 1949 to act as a counselor in its Green Pastures Camp for under-privileged Negro boys and girls. A thorough check into my financial standing while an undergraduate student at Bucknell Uni-

4

versity, would readily reveal that I was in continual financial difficulty. Consequently, I was willing to accept the quickest and most reasonable employment available during my summer vacations. However, the National Urban League or its Detroit branch has never been known by me to have been a subversive organization. Reports to the effect that it is subversive, could only be construed by myself and certainly by Negroes all over the United States, as an outright attack upon the efforts of the Negro people to better their condition in this country, with subsequent hope that a democratic pattern of activity might be established for colored peoples all over the world in their efforts toward self and group betterment.

"Alleg: c) American Labor Party registration in 1952.

Ans: c) To the best of my knowledge, the American Labor Party is a legally recognized political organization in the state of New York. The right to vote for the Party of one's choice has from the beginning of American political maturity, been a most precious and cherished democratic tenet. Notwithstanding the reports of the House Un-American Activities Committee, I shall as a democratic and loyal American continue to vote for any legally recognized political party of my own choosing.

"Alleg: c) Solicitation of funds for persons under indictment under the Smith Act.

Ans: c) That I knowingly solicited funds for persons under indictment under the Smith Act, I do not deny. I do however, contend both as a firm believer in the fullest exercise of all rights embodied in the constitution of the United States, and as a student of Political Science, that a person is innocent until proven guilty, and that the reverse is not so. Therefore, I consider my actions in this matter as nothing more than the exercise of a constitutional prerogative. I can rely on public records to show that many leading legal authorities in this country, and even members of the United States Supreme Court, have not been

convinced of the legality or constitutionality of the Smith Act.

"Alleg: e & f) Allegations concerning my father John, and my stepmother Susie Harmon.

"Ans: e & f) It is with deepest moral indignity coupled with a devout sense of filial piety, that I refuse to answer the derogatory statements made under allegations e and f. As neither my father nor stepmother are employed in any capacity by the federal government, I am led to the conclusion that derogatory information concerning them is wholly irrelevant to the case at hand.

"Alleg: g) Knowing or acquaintance with communists or Communist sympathizers.

Ans: g) I am not nor have I ever been a member of the Communist Party of the United States. As a rather talented public speaker, I have appeared before many groups and audiences from childhood onward. It is quite possible that I have known or been acquainted with Communists or their sympathizers. I do not however, hold with the 'guilt by association' gimmick employed by some persons or groups of persons in our present day society. If the above gimmick is to be considered a legal procedure for the impugning of one person's character, how then can our government's relations with the regime of General Tito's Yugoslavia be justified, when such an association must surely reflect in one manner or another upon a nation's character?"

8. On or about April 2, 1954, the Adjutant General, by order of defendant, informed plaintiff's Commanding Officer that a discharge of plaintiff as disloyal or subversive under the provisions of Army Regulation 615-370 had not been favorably considered, but that plaintiff would be assigned to non-sensitive duty in the lowest pay grade and on or about April 2, 1954, the Adjutant General, by order of the defendant, notified plaintiff as follows:

"1. Reference is made to letter from this office dated 9 February 1954.

"2. The allegations in your case and your reply thereto have been reviewed in the Department of the Army. It has been determined that you will be retained in the service in your present grade, that you will not be promoted and that upon completion of your term of service you will be discharged with a type of discharge appropriate to the character of service you have rendered as of the date you are eligible for separation.

"By Order of the Secretary of the Army:

9. On or about the 26th day of May, 1954, the Adjutant General, by order of defendant, rescinded the provisions of the order dated April 2, 1954 as aforesaid, and informed plaintiff's Commanding Officer that by order of defendant, plaintiff would be discharged under the provisions of Army Regulation 615-370, and given an "Undesirable Discharge."

10. On or about the 2nd day of June, 1954, plaintiff was separated from the Army of the United States under the provisions of Army Regulation 615-370, at Transfer Point Camp Pickett, Virginia, with an "Undesirable Discharge." A photostatic copy of plaintiff's discharge certificate (DD Form 258A) is annexed hereto and made a part hereof as plaintiff's Exhibit 1); a photostatic copy of plaintiff's report of separation from the Armed Forces of the United States (DD Form 214) is annexed hereto and made a part hereof as Plaintiff's Exhibit 2).

11. The allegations in the letter of the Adjutant General, dated February 9, 1954, as aforesaid, relate solely to lawful and legal activities and associations which plaintiff carried on as part of his civilian life prior to the time of his induction into the Army of the United States on or about October 31, 1952, except that in November, 1952, plaintiff wrote a letter to two friends suggest-

ing that they make a financial contribution to assist the defense of two individuals who had been indicted in Detroit, Michigan for violation of the Smith Act, the Act of June 28, 1940. c. 439, Section 2, 54 Stat. 670, 18 U.S.C., Section 2385.

12. The action of defendant on or about May 26, 1954, ordering plaintiff discharged from the Army of the United States with an "Undesirable" Discharge and plaintiff's discharge from the Army of the United States on June 2, 1954, with an "Undesirable" Discharge, was arbitrary, capricious and in violation of the Act of June 4, 1920, c. 227 Subchapter II, Section 1, 41 Stat. 808, as amended July 26, 1947, c. 343, Title II, Section 205(a), 61 Stat. 501, May 5, 1950, c. 169, Section 6(b), 64 Stat. 145, 10 U.S.C., Section 652(a), and Army Regulation No. 615-375 established thereunder.

13. By reason of said "Undesirable" Discharge, plaintiff has been and will continue to be deprived of substantial monetary benefits and rights as a veteran under both Federal and State legislation, and plaintiff has encountered and will continue to encounter substantial prejudice in civilian life in situations where the type of service rendered in the Armed Forces of the United States, or the character of discharge received therefrom, has any bearing.

8 14. The action of defendant hereinbefore alleged has deprived plaintiff of liberty and property without due process of law, and has branded plaintiff disloyal to his Country, arbitrarily and without basis in fact, and without a fair procedure or any hearing whatever.

15. The action of defendant hereinbefore alleged was taken without an adequate standard of loyalty, disloyalty or subversion; without sufficiently definite statement of charges or allegations of fact; without any hearing whatever; without evidence of disloyality without confrontation and cross-examination of witnesses; on the basis of undisclosed information which plaintiff had no opportunity to refute, and without a statement of the reasons plaintiff

was declared disloyal and/or subversive and discharged as "Undesirable." The imposition of the punishment of an "Undesirable" Discharge without a judicial trial or an administrative hearing constitutes a violation of the prohibition against bills of attainer and ex post facto laws by punishing plaintiff through a determination that his services to the Army of the United States were undesirable and that plaintiff was disloyal and/or subversive.

16. The action of defendant was based solely on allegations of plaintiff's lawful political opinions, affiliations and associations which were the subject of the letter of the Adjutant General, dated February 9, 1954, as aforesaid, and thus violated the right of freedom of speech, opinion and association. The Defendant's action constituted an exercise of judicial authority and power not in accordance with established principles of due process of law and was in violation of Article III of the Constitution.

9 17. The character and efficiency of plaintiff's service in the Army of the United States from October 31, 1952 until the receipt of his "Undesirable" Discharge on June 2, 1954 was "excellent," and plaintiff's service record bears two character and efficiency recommendations; the first, for the period November 14, 1952 to July 28, 1953, is marked "excellent" as to character and efficiency; the second, for the period August 2, 1953 to April 24, 1954, is marked "excellent" as to character and efficiency.

18. Plaintiff is not now and never has been, a member of the Communist Party, or of any Communist cell or unit, or of any Communist organization, or of any organization that advocated the overthrow of the Government, or of any organization which advocated a policy of approving or advocating the commission of acts of force or violence to deny other persons their rights under the Constitution, or of any organization which seeks to alter the form of government of the United States by un-Constitutional means, or of any organization which, to his knowledge, has engaged in subversive activities of any kind or nature.

19. Plaintiff is, and has always been, completely and unswervingly loyal to the Government of the United States and would not hesitate to lay down his life in defense of the United States against any and all of its enemies whomsoever.

20. On or about the 8th day of June, 1954, plaintiff made an application to the Army Discharge Review Board to have the nature of his discharge changed from "Undesirable" to "Honorable," and on the 22nd day of October, 1954, plaintiff appeared before said Board in Washington, D. C., but on or about the 15th day of November, 1954 plaintiff, was informed that his application for a change of his discharge from "Undesirable" to "Honorable" had been denied.

21. On or about the 1st day of December, 1954, plaintiff applied to the Army Board for the Correction of Military Records to have his discharge changed from "Undesirable" to "Honorable," but on or about the 27th day of January, 1955, plaintiff was advised that his application has been denied.

22. On or about the 1st day of February, 1955, plaintiff requested defendant to change his discharge from "Undesirable" to "Honorable," but to date defendant has failed and refused, and continues to fail and refuse to do so.

23. There exists between plaintiff and defendant herein, an actual controversy, and plaintiff has instituted this action for the purpose, among others, of having the aforesaid action of defendant in discharging plaintiff from the Army of the United States with an "Undesirable" Discharge on June 2, 1954, declared null, void, illegal, and in violation of the Act of June 4, 1920, c. 227, Subchapter II, Section 1, 41 Stat. 809, as amended July 26, 1947, c. 343, Title II, Section 205(a), 61 Stat. 501, May 5, 1950, c. 169, Section 6(b), 64 Stat. 145, and Army Regulation No. 615-375 established thereunder; in violation of the FIRST, FIFTH and SIXTH Amendments of the Constitution of the United

States, and further in violation of Articles I and III of the Constitution of the United States.

24. Plaintiff has exhausted all of the remedies available to him under applicable administrative procedures and has no adequate remedy at law, other than the instant action, under the jurisdiction conferred by this Court.

25. By reason of the premises plaintiff is entitled to relief against defendant under the Federal Declaratory Judgment Act of June 14, 1934, 28 U.S.C., Sections 2201 and 2202.

26. That no prior application for this or any other relief has been made to this or any other court,

WHEREFORE, plaintiff prays for the following:

1. That the action of defendant in discharging plaintiff from the Army of the United States with an "Undesirable" Discharge on June 2, 1954, be declared to be null, void, illegal, and in violation of the FIRST, FIFTH and SIXTH Amendments to the United States Constitution; in violation of Articles I and III of the United States Constitution, in violation of the Act of June 4, 1920, c. 227, Subchapter II, Section 1, 41 Stat. 809, as amended July 26, 1947, c. 343, Title II, Section 205(a), 61 Stat. 501, May 5, 1950, c. 169, Section 6(b), 64 Stat. 145, and Army Regulation No. 615-375 established thereunder;

2. That plaintiff's discharge from the Army of the United States on June 2, 1954, be ordered changed from "Undesirable" to "Honorable" as of June 2, 1954; and

3. For such other and further relief as to this court may seem just and proper in the premises.

DICKSTEIN, SHAPIRO & FRIEDMAN
350 Fifth Avenue,
New York 1, New York

By: DAVID I. SHAPIRO
David I. Shapiro, a member of the firm.

HELEN M. ROSENTHAL
Helen M. Rosenthal
918 Colorado Building
Washington 5, D. C.
Attorneys for Plaintiff

Note

Pages 13 and 14
are on Card 2

18 Filed July 19, 1955

Answer

Defendant answers the complaint as follows:

1. Defendant admits the allegations of paragraph 1 of the complaint.

2. Defendant admits the allegations of paragraph 2 of the complaint.

3. Defendant denies the allegations of paragraph 3 of the complaint.

4. For lack of knowledge and information sufficient to form a belief, defendant denies the allegations of paragraph 4 of the complaint.

5. Defendant admits the allegations of paragraph 5 of the complaint.

6. Defendant admits the allegations of paragraph 6 of the complaint.

7. Defendant admits the allegations of paragraph 7 of the complaint.

8. Defendant admits the allegations of paragraph 8 of the complaint.

9. Defendant admits the allegations of paragraph 9 of the complaint.

19 10. Defendant admits the allegations of paragraph 10 of the complaint.

11. Defendant denies the allegations of paragraph 11 of the complaint.

12. Defendant denies the allegations of paragraph 12 of the complaint.

13. Defendant denies the allegation of paragraph 13 of the complaint that "By reason of said 'Undesirable' Discharge, plaintiff has been and will continue to be de-

prived of substantial monetary benefits and rights as a veteran under both Federal and State legislation." For lack of knowledge and information sufficient to form a belief, defendant denies the remaining allegations of paragraph 13 of the complaint.

14. Defendant denies the allegations of paragraph 14 of the complaint.

15. Defendant admits that his action was taken without any hearing, without any confrontation and cross examination of witnesses by plaintiff, and without "a statement of the reasons plaintiff was declared disloyal and/or subversive and discharged as "Undesirable," except that the report of plaintiff's separation from the Armed Forces (Exhibit 2 to the Complaint) stated as the reason and authority for separation Army Regulations 615-370.

Except as herein admitted, defendant denies the allegations of paragraph 15 of the complaint.

16. Defendant denies the allegations of paragraph 16 of the complaint.

17. Defendant admits the allegations of paragraph 17 of the complaint.

18. For lack of knowledge and information sufficient to form a belief, defendant denies the allegations of paragraph 18 of the complaint.

19. For lack of knowledge and information sufficient to form a belief, defendant denies the allegations of paragraph 19 of the complaint.

20. Defendant admits the allegations of paragraph 20 of the complaint.

21. Defendant admits the allegations of paragraph 21 of the complaint.

22. Defendant admits the allegations of paragraph 22 of the complaint.

23. Defendant denies the allegations of paragraph 23 of the complaint.

24. Defendant admits the allegations of paragraph 24 of the complaint.

25. Defendant denies the allegations of paragraph 25 of the complaint.

26. Defendant admits the allegations of paragraph 26 of the complaint.

ADDITIONAL DEFENSES

1. This Court has no jurisdiction over the subject matter of the complaint.

2. The complaint fails to state a claim upon which any relief can be granted.

/s/ JOSEPH D. GUILFOYLE
Acting Assistant Attorney General
/s/ EDWARD H. HICKEY
Attorney, Department of Justice
/s/ DONALD B. MACGUINEAS
Attorney, Department of Justice
Counsel for defendant

Filed August 25, 1955

Plaintiff's Motion for Summary Judgment

Pursuant to Rule 56(a) of the Federal Rules of Civil Practice, plaintiff moves this Court to enter summary judgment in favor of the plaintiff herein on the ground that plaintiff is entitled to judgment as a matter of law.

As ground for the motion, plaintiff states that it appears clearly from the Complaint and Answer and the affidavit

of plaintiff hereto annexed that defendant's action in discharging plaintiff from the Army of the United States with an "Undesirable Discharge" under the provisions of Army Regulation No. 615-370 as "disloyal or subversive" was arbitrary, capricious and in violation of 10 U.S.C. Section 652(a) and Army Regulation No. 615-375 established thereunder, and was further in violation of the First, Fifth and Sixth Amendments to the United States Constitution and Article 3, Section 3, Clause 1 thereof.

In support of this motion, the Court is respectfully
23 referred to the pleadings and exhibits on file and the annexed affidavit of plaintiff, together with the attached Memorandum of Points and Authorities in support of plaintiff's motion for summary judgment.

/s/ JAMES H. HELLER
1026 Woodward Building
Washington 6, D. C.

DAVID I. SHAPIRO
David I. Shapiro
350 Fifth Avenue
New York 1, New York

Attorneys for Plaintiff

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24 **Affidavit Submitted in Support of Motion for Summary Judgment Under Rule 56(a) of the Federal Rules of Civil Procedure**

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

JOHN HENRY HARMON, III, being duly sworn, deposes and says:

I am the plaintiff in the above-captioned action and submit this affidavit in support of my motion for summary judgment under Rule 56(a) of the Federal Rules of Civil Procedure.

The following facts are undisputed or admitted:

On or about the 31st day of October, 1952, your deponent, a resident of the City and State of New York, was duly inducted into the Armed Forces of the United States (Army), under and pursuant to the provisions of the Universal Military Training and Service Act of 1948, 62 Stat. 604, 50 App. U.S.C., Section 451 et seq.

Thereafter and on or about February 9, 1954, your deponent, who then held the rank of Private E-1, Service No. U. S. 51 207 184, was notified by the Adjutant General of the Army that by order of defendant I was to reply to certain derogatory information which had been received concerning me, and which is specifically set out in paragraph numbered "6" of the complaint.

On or about March 11, 1954, I replied to said allegations. My reply is set out in paragraph numbered "7" of the complaint.

Subsequently, and on or about April 2, 1955, the Adjutant General, by Order of the Secretary of the Army, informed my Commanding Officer that my discharge as disloyal or subversive under the provisions of Army Regulation 615-370 had not been favorably considered. Instead, I was to be assigned to non-sensitive duty in the lowest pay grade and retained in the Army.

At the same time, I was personally informed by the Adjutant General as follows:

"1. Reference is made to letter from this office dated 9 February, 1954.

"2. The allegations in your case and your reply thereto have been reviewed in the Department of the Army. It has been determined that you will be retained in the service in your present grade, that you will not be promoted and that upon completion of your term of service and you will be discharged with a type of discharge

appropriate to the character of service you have rendered as of the date you are eligible for separation.

"By Order of the Secretary of the Army."

However, fifty-five days later and on or about May 26, 1954, without notice to me or providing me with a hearing, the Adjutant General, by Order of the Secretary of the Army, rescinded the provisions of the previous order and informed my Commanding Officer that I would be discharged under the provisions of Army Regulation No. 615-370 and given an "Undesirable Discharge."

On or about the 2nd day of June, 1954, I was separated from the Army of the United States under the provisions of Army Regulation No. 615-370, at Transfer Point Camp Pickett, Virginia, with an "Undesirable Discharge." A photostatic copy of my discharge certificate is annexed to the Complaint as "Plaintiff's Exhibit 1"; a photostatic copy of my report of separation from the Armed Forces of the United States is annexed to the Complaint as "Plaintiff's Exhibit 2."

It is admitted by defendant that the character and efficiency of my service in the Army of the United States from October 31, 1952 until the receipt of my "Undesirable Discharge" on June 2, 1954, was "excellent" and that my service record bears two character and efficiency recommendations for excellent service.

On or about the 8th day of June, 1954, approximately six days subsequent to the receipt of my undesirable dis-
27 charge, I made an application to the Army Discharge Review Board to have the nature of my discharge changed from "Undesirable" to "Honorable." However, on or about the 15th day of November, 1954, I was informed that my application was denied.

Thereafter, and on or about the 1st day of December, 1954, I applied to the Army Board for the Correction of Military Records to have the nature of my discharge

changed from "Und sirable" to "Honorable," but on or about the 27th day of January, 1955, I was advised that my application had been denied.

On or about the 1st day of February, 1955, I requested the Secretary of the Army to change the nature of my discharge from "Undesirable" to "Honorable," but to date he has failed and refused and continues to fail and refuse to do so. It is admitted by defendant that I have exhausted all of the remedies available to me under applicable administrative regulations and that I have no adequate remedy at law other than the instant action, under the jurisdiction conferred by this Court.

Controverted Allegations

It should be noted that in paragraph numbered "13" of the Complaint it is alleged that:

"By reason of said "Undesirable" Discharge, plaintiff has been and will continue to be deprived of substantial monetary benefits and rights as a veteran under both Federal and State legislation, and plaintiff has encountered and will continue to encounter substantial prejudice in civilian life in situations where the type of service rendered in the Armed Forces of the United States, or the character of discharge received therefrom, has any bearing."

Defendant has denied this allegation in paragraph numbered "13" of his Answer, which reads:

"Defendant denies the allegation of paragraph 13 of the complaint that 'By reason of said "Undesirable" discharge, plaintiff has been and will continue to be deprived of substantial monetary benefits and rights as a veteran under both Federal and State legislation.' For lack of knowledge and information sufficient to form a belief, defendant denies the remaining allegations of paragraph 13 of the complaint."

This Court will readily see that as a result of my "Undesirable" discharge, I have, as a matter of law, been specifically deprived of the following substantial monetary benefits and rights as a veteran both under Federal and State legislation:

1. A Federal Civil Service priority (5 U.S.C., Section 851);

2. A New York State Civil Service priority (New York Civil Service Law, Section 21);

3. "Mustering-out" pay of $200.00 (38 U.S.C., Section 691(a) as amended);

4. A veteran's education scholarship provided by the State of New York (New York Education Law, Section 608);

5. Many other benefits provided by the laws of the State of New York for veterans who have been discharged from the Armed Forces of the United States under "Honorable" conditions. (See e.g., N.Y. Soc. Wel. Law, Sect. 168; New York General Municipal Law, Sect. 148; New York General Business Law, Sect. 32.)

Moreover, under the provisions of SR-600-220-1, 29 effective June 18, 1954, the Army provides individuals who accept a discharge under the regulation with a "form letter" (SR 600-200-1; Par. 29(C)(2)) which reas as follows:

"I hereby accept discharge as directed by the Army Review Board under the provisions of SR 600-200-1. I understand that said discharge may be undesirable. I further understand that my separation from the Army effected by undesirable discharge will be under conditions other than Honorable; that I may be deprived of my rights as a veteran under both Federal and State legislation and may encounter substantial prejudice in civilian life in situations where the type of service rendered in any branch of

the Armed Forces of the character of discharge received therefrom may have a bearing."

Consequently, it is clear as a matter of law that I have been deprived of substantial monetary benefits and rights as a veteran both under Federal and State legislation by virtue of said "Undesirable Discharge," and that defendant's denial fails to raise an issue of fact with respect to the matters controverted by paragraph numbered "13" of his Answer.

In addition, I respectfully direct the Court's attention to paragraphs numbered "18" and "19" of the Complaint, wherein it is alleged that:

"18. Plaintiff is not now and never has been, a member of the Communist Party, or of any Communist cell or unit, or of any Communist organization, or of any organization that advocated the overthrow of the Government, or of any organization which advocated a policy of approving or advocating the commission of acts of force or violence to deny other persons their rights under the Constitution, or of any organization which seeks to alter the form of government of the United States by unConstitutional means, or of any organization which, to his knowledge, has engaged in subversive activities of any kind or nature."

"19. Plaintiff is, and has always been, completely and unswervingly loyal to the Government of the United States and would not hesitate to lay down his life in defense of the United States against any and all of its enemies whomsoever."

I respectfully request the Court to note that in his Answer, defendant controverted these allegations as follows:

Answer, Par. "18. For lack of knowledge and information sufficient to form a belief, defendant denies the allegations of paragraph 18 of the complaint."

Answer, Par. "19. For lack of knowledge and information sufficient to form a belief, defendant denies the allegations of paragraph 19 of the complaint."

I believe that this Court will find it difficult to conceive how defendant could have pleaded a "lack of knowledge and information sufficient to form a belief" as to the allegations contained in paragraphs numbered "18" and "19" of the Complaint when defendant ordered me discharged from the Army of the United States with an "Undesirable Discharge" under the provisions of Army Regulation No. 615-370.

Army Regulation No. 615-370 provides in Paragraph 4(B)(L)(a) thereof that the Secretary of the Army will direct a discharge of military personnel below the
31 grade of Warrant Officer, Junior Grade during peacetime, as follows:

"Direct undesirable discharge of individuals who have been determined by investigation to be disloyal or subversive, but in whose cases trial by court martial is deemed not feasible or warranted."

In short, I was discharged from the Army with in "Undesirable Discharge" because it had been determined by investigation that I was "disloyal" or "subversive." However, when I alleged in my complaint that I am neither "disloyal" nor "subversive," the Secretary of the Army denies these allegations on the ground that he has a "lack of knowledge and information sufficient to form a belief" as to such matters. It is clear that if defendant had a lack of knowledge and information sufficient to form a belief as to whether I was "disloyal" or "subversive," my undesirable discharge under the provisions of Army Regulation 615-370 was patently arbitrary.

Consequently, and as a matter of law, either defendant's answer fails to raise an issue of fact with respect to the paragraphs numbered "18" and "19" of his Answer, being

deemed admitted for the purposes of this motion, or my "Undesirable Discharge" as "disloyal or subversive" was patently arbitrary.

Further Admissions

In paragraph numbered "15" of defendant's answer, defendant admits that my "Undesirable Discharge" was effected as follows:

"15. Defendant admits that his action was taken without any hearing, without any confrontation and cross examination of witnesses by plaintiff, and without 'a statement of the reasons plaintiff was declared as "Undesirable,"' except that the report of plaintiff's separation from the Armed Forces (Exhibit 2 to the Complaint) stated as the reasons and authority for separation Army Regulations 615-370."

Conclusion

Upon the pleadings, the admissions contained in defendant's answer, and the facts set forth herein, your deponent respectfully submits that the action of the Secretary of the Army which resulted in my discharge from the Army of the United States with an "Undesirable Discharge" be declared invalid for the following reasons:

1. The action of defendant on or about May 26, 1954, ordering me discharged from the Army of the United States with an "Undesirable Discharge," and my discharge from the Army of the United States on June 2, 1954, with an "Undesirable Discharge," was arbitrary, capricious and in violation of 10 U.S.C., Section 652(a), and Army Regulation No. 615-375 established thereunder.

2. The action of defendant has deprived me of liberty and property without due process of law, and has branded me disloyal to my country, arbitrarily and without basis in fact, and without a fair procedure or hearing.

3. The action of defendant was taken without any adequate standard of loyalty, disloyality or subversiveness; without any hearing whatever; without confrontation and cross examination of witnesses; and without the statement of the reasons why I was declared disloyal and/or
33 subversive and discharged as "Undesirable;" the imposition of the punishment of an "Undesirable Discharge" without a judicial trial or an administrative hearing constitutes a violation of the prohibition against bills of attainder by punishing me through a determination that my services to the Army of the United States were undesirable and that I was disloyal and/or subversive.

4. Army Regulation No. 615-370 on which the action of defendant was based was un-Constitutional on its face and in violation of Article III, Section 3, Clause 1 of the Constitution and the First, Fifth and Sixth Amendments thereof.

For the foregoing reasons, your deponent believes he is entitled to summary judgment for the relief demanded in the Complaint, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure.

JOHN HENRY HARMON, III
John Henry Harmon, III

Sworn to before me this 19th day of August, 1955.

DAVID ISRAEL SHAPIRO

Notary Public in the State of New York
Qualified in New York County
No. 31-8937325
Filed in Kings and N. Y. Co.
Term Expires March 30, 1956

81 Filed September 8, 1955

Supplemental Complaint

1. On July 21, 1955, subsequent to the filing of the original complaint herein, Robert T. Stevens, named as defendant in that complaint, resigned as Secretary of the Army and defendant Wilber M. Brucker took office as his successor. Since that date, said Wilber M. Brucker has adopted and continued the actions of said Robert T. Stevens complained of in the original complaint and has failed or refused to change plaintiff's military service discharge from "Undesirable" to "Honorable."

WHEREFORE, plaintiff prays that the relief requested in his original complaint be granted against and as to defendant Wilber M. Brucker.

DICKSTEIN, SHAPIRO & FRIEDMAN
350 Fifth Avenue
New York 1, New York

By: DAVID I. SHAPIRO
David I. Shapiro
JAMES H. HELLER
James H. Heller
1026 Woodward Building
Washington 5, D. C.
Attorneys for Plaintiff

82 VERIFICATION

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

JOHN HENRY HARMON, III, being duly sworn upon his oath, says that he is the plaintiff in this action, that he has read the foregoing Supplemental Complaint and that the

factual allegations contained therein are true to his own knowledge.

JOHN HENRY HARMON, III
John Henry Harmon, III

Subscribed and sworn to before me this
6th day of September, 1955.

HAROLD FRIEDMAN
Notary Public
Notary Pubile, State of New York
Qualified in Queens County
No. 41-6412025
Term Expires March 30, 1956

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91 Filed November 15, 1955

Motion by Defendant for Summary Judgment

Defendant moves the Court for summary judgment on the grounds that there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law.

In support of this motion the Court is respectfully referred to the affivadits attached to and made a part of this motion, and to defendant's accompany memorandum of points and authorities in support of this motion and in opposition to plaintiff's motion for summary judgment.

/s/ WARREN E. BURGER
Assistant Attorney General
/s/ EDWARD H. HICKEY
/s/ DONALD B. MACQUINEAS
/s/ HOWARD E. SHAPIRO
Department of Justice
Attorneys for defendants

98 **Affidavit in Support of Defendant's Motion for Summary Judgment**

Department of Army, The Pentagon, Washington 25, D. C.
ss: (Place where sworn)

Edward Duvall, Colonel, Judge Advocate General Corps, United States Army, being duly sworn, deposes and says:

I am Recorder and Custodian of Records of the Department of the Army Review Board, an administrative board which succeeded to the functions of the Army Personnel Board, Office of the Assistant Chief of Staff, G-1, Personnel, United States Army, in cases arising under the military personnel security program. In this capacity I am custodian of records prepared by the Army Personnel Board in the matter of former Private John Henry Harmon III, U.S. 51 207 184. From an examination of these records I have ascertained that on 29 March 1954 the Army Personnel Board recommended to the Assistant Chief of Staff, G-1, Personnel, that Private Harmon, who had been investigated as a possible security risk, be retained in the service in the lowest enlisted grade assigned to non-sensitive duties. This recommendation was based upon Paragraph 4d, Army Regulation 615-370 dated 6 December 1950 which provides:

99 4. Policy

* * * * * * * * * *

d. Retention in service.—During national emergency, war, or mobilization, direct retention in service, under continuing surveillance, of individuals in whose cases circumstances and facts disclosed during the investigation provide insufficient evidence or disloyalty or subversion, but sufficient evidence to render the individuals security risks.

EDWARD DUVALL

Edward Duvall, *Colonel, JAGC*
Recorder and Custodian of Records, Department of the Army Review Board.

Subscribed and sworn to before me, Cecil L. Forinash, Lieutenant Colonel, JAGC;

This 28th day of September 1955.

CECIL L. FORINASH.
Cecil L. Forinash, *Lt. Colonel; JAGC* Authorized to administer oaths under Article 136 (a)(1), Uniform Code of Military Justice, 64 Stat. 143 (1950), 50 U.S.C. 736.

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100 **Affidavit in Support of Defendant's Motion for Summary Judgment**

Department of the Army
ss: The Pentagon
Washington 25, D. C.

Clair H. Thurston, Lieutenant Colonel, General Staff, United States Army, being duly sworn, deposes and says:

1. I am an officer assigned to duty in the Personnel Actions Branch, Office of the Assistant Chief of Staff, G-1, United States Army. On or about 16 April 1954 I forwarded the record in the matter of Private John Henry Harmon, III, U.S. 51 207 184 to the Army Personnel Board, Office of the Assistant Chief, G-1, Personnel, for reconsideration in the light of Department of Defense Directive 5210.9 dated April 7, 1954, a copy of which is attached to and made a part of this affidavit. I had received the record in Private Harmon's case from the Adjutant General, United States Army, who had requested that the Army Personnel Board reconsider Private Harmon's status in the Army under the aforementioned directive, in compliance with Paragraph One, Memorandum from the Secretary of Defense for the Secretaries of the Military Departments dated April 7, 1954, which required that a review be made of all security cases which had

been closed prior to the issuance of Department of Defense Directive 5210.9. A copy of this memorandum is attached to and made a part of this affidavit.

101 2. It is personally known to me that the Assistant Chief of Staff, G-1, Personnel, United States Army on May 25, 1954 approved and dispatched to the Adjutant General, United States Army, the recommendation of the Army Personnel Board under the criteria of Department of Defense Directive 5210.9 that Private Harmon's further retention in the service was inconsistent with the interests of national security and that he should therefore be discharged with an Undesirable Discharge.

C. H. THURSTON
Clair H. Thurston, *Lieutenant Colonel*, GS Personnel Actions Branch, Office of the Assistant Chief of Staff, G-1, Personnel United States Army

Subscribed and sworn to before me Cecil L. Forinash, Lieutenant Colonel, JAGC, on this 29th day of September, 1955.

CECIL L. FORINASH
Cecil L. Forinash, *Lieutenant Colonel, JAGC* Authorized to administer oaths under Article 136(a)(1), Uniform Code of Military Justice, 64 Stat. 143 (1950), 50 U.S.C. 736.

102 April 7, 1954

MEMORANDUM FOR:

The Secretary of the Army
The Secretary of the Navy
The Secretary of the Air Force

REFERENCE:

(a) Department of Defense Directive No. 5210.9, 7 April 1954, subject: "Military Personnel Security Program".

1. It is directed that a review be made of all cases which have been cleared prior to the issuance of reference (a) in each of the Military Departments, including officers, warrant officers, and enlisted personnel, both members of the regular armed services and the reserves. The Assistant Secretary of each Military Department in charge of manpower and personnel should be charged with personal supervision of this review. The attention of the Assistant Secretary of Defense (Manpower and Personnel) will be invited to any case wherein any question arises under critical review as to whether the retention of the individual in the armed services is clearly consistent with the interest of national security.

2. Security regulations in each Military Department should be reviewed to improve the safeguards against the entry into service of persons whose exclusion is justified on the grounds of security, prior to the appointing, commissioning or recall to active duty of any individual as an officer. In addition to the execution of Form 98, a national agency check should be accomplished. Because of the difficulties attendant to this course of action in a situation such as the call to active duty of newly appointed officers from ROTC sources, a reasonable length of time should be allowed to avoid the disruption of class entry schedules.

3. Personnel records and all investigative records in regard to the security of personnel not now effectively

correlated shall be correlated without delay in each of the Military Departments to insure that full facts are available for prompt and fair administration of all personnel matters.

Signature authenticated by: /s/
Signed

C. E. WILSON
Secretary of Defense

HENRY E. LOFDAHL
Chief, Correspondence
Control Section

103

7 April 1954

NUMBER 5210.9

DEPARTMENT OF DEFENSE DIRECTIVE

SUBJECT Military Personnel Security Program

References:

(a) Joint Agreement of the Secretaries of the Armed Forces, Subject: Disposition of Commissioned and Enlisted Personnel of the Armed Forces of Doubtful Loyalty, dated 26 October 1948.*

(b) Office of the Secretary of Defense Memorandum to Department Secretaries, Subject: Policy with Respect to Loyalty Examination of Inducted Persons and Disposition of Inducted Persons Determined to be or Suspected of Being Disloyal, dated 15 November 1949.*

(c) Office of the Secretary of Defense Memorandum to Department Secretaries, Subject: Policy Concerning Military Personnel who are Considered Security Risks (M-11B-50), 19 February 1951.*

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* Will be cancelled by this directive.

(d) Presidential Executive Order 10450, Subject: Security Requirements for Government Employment, dated 27 April 1953.

(e) Presidential Executive Order 10491, Subject: Amendment of Executive Order No. 10450 of April 27, 1953, Relating to Security Requirements for Government Employment, dated 13 October 1953.

I. PURPOSE AND SCOPE

A. *Purpose*

1. The purpose of this directive is to effect reissue with certain modifications of the various Armed Services directives to apply to military personnel the criteria for security programs established as national policy for civilian personnel by Executive Order 10450 as amended by Executive Order 10491.

103A 2. This directive prescribes the standard and criteria for the separation of military members from the Armed Services in the interest of national security and the rejection of applicants for appointment or enlistment or of persons who would otherwise be inducted or involuntarily ordered into active military service whose acceptance into the services is not clearly consistent with the interests of national security. This is an administrative directive and does not preclude trial by court-martial when such action is considered appropriate by an Armed Service. It does not preclude separation on grounds other than security reasons under other applicable directives. Further, procedures pursuant to this directive should not be used in those cases in which security considerations are not the primary reason for initiation of action with a view toward separation.

B. *Scope*

This directive applies to all male and female commissioned officers, warrant officers, and all other members and

prospective members of the Armed Services, including the Coast Guard when the Coast Guard is operating as a part of the Navy Department.

II. General Policy

The Department of Defense will assume that the acceptance or retention of any member of the Armed Services is clearly consistent with the interest of national security unless and until a determination to the contrary is made by competent authority in the Armed Service concerned. However, when credible information which raises the question of security is received, action will be taken to determine whether acceptance or retention is consistent with the interests of national security. In no case will any person, reasonably believed to have at any time engaged in any of the activities listed in VII, C, 1, below, be appointed or enlisted in any of the Armed Services without the approval of the Secretary of the Armed Service concerned. Any member who is separated under the provisions of the appropriate Armed Service directive issued in implementation of this directive, or whose records reflect that he was separated under other authority while undergoing investigation under the provisions of such directive, will not be appointed or enlisted in any of the Armed Services at a later date without the approval of the Secretary of the Armed Service concerned.

III. Definition

National Security. As used herein, the term "national security" relates to the protection and preservation of the military, economic, and productive strength of the United States, including the security of the government in domestic and foreign affairs, against or from espionage, sabotage, and subversion, and any and all acts designed to weaken or destroy the United States.

104 IV. Cancellation

References (a), (b), and (c), above, are cancelled.

V. Reporting of Information

It shall be the duty of every member of the Armed Services to report to his commanding officer any information coming to his attention which indicates that retention of any member of the Armed Services is not clearly consistent with the interests of national security. Investigations by activities of the Armed Services will develop all relevant facts with special emphasis being given to that information which supports or refutes an allegation stemming from the criteria hereinafter described.

VI. Disposition of Pending Cases

The processing of all security cases will be in accordance with instructions issued in implementation of this directive.

VII. Standard and Criteria

A. *Standard.*

The standard for appointment, enlistment, or retention within the Armed Services shall be that on all the available information it is determined that the appointment, enlistment, or retention is clearly consistent with the interests of national security.

B. *Criteria for Application of Standard.*

An officer or warrant officer of the Armed Services holds a sensitive position by virtue of his commission of warrant regardless of the duties and responsibilities of his assignment. Likewise, an enlisted member whose qualifications would normally require that he have access to classified information or materiel will be considered to hold a sensitive position regardless of the duties and responsibilities of his assignment. Nothing herein will serve to preclude temporary assignment to specially controlled duty as a security measure. However, indefinite assign-

ment to such duty will be made only as prescribed by the Secretary of the Armed Service concerned.

C. *Application of Criteria.*

1. The ultimate determination of whether acceptance or retention in the Armed Services is clearly consistent with the interests of national security must be an over-all common sense determination based on all available information. The activities and associations listed below, whether current or past and while not all inclusive, are of varying degrees of seriousness and warrant consideration of
104A action to effect such determination:

a. Commission of any act of sabotage, espionage, treason or sedition, or attempts thereat or preparation therefor, or conspiring with or aiding or abetting another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

b. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests are inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of Government of the United States by unconstitutional means.

c. Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of Government of the United States by unconstitutional means.

d. Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which

has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights, under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means. (An organization, movement, or group, officially designated by The Attorney General of the United States to be totalitarian, Fascist, Communist, or subversive, to advocate or approve forcible or violent denial of Constitutional rights, or to seek alteration of the form of Government of the United States by unconstitutional means, shall be presumed to be of a character thus designated until the contrary be established).

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Failure or refusal to sign loyalty certificate DD Form 98; pleading protection of the Fifth Amendment or of Article 31, Uniform Code of Military Justice, in refusing to completely answer questions contained in DD Forms 98, 390, or 398; pleading protection of the Fifth Amendment or of Article 31, Uniform Code of Military Justice, or otherwise failing or refusing to answer any pertinent question propounded in the course of an official investigation, interrogation, or examination, conducted for the purpose of ascertaining the existence or extent, or both, of conduct of the nature described in a through e above, and g through m below.

g. Participation in the activities of an organization as a front for an organization referred to in d above, when his personal views were sympathetic to the subversive purposes of such organization.

h. Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the

individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purposes.

i. Participation in the activities of an organization referred to in d above, in a capacity where he should reasonably have had knowledge of the subversive aims or purposes of the organization.

j. Sympathetic association with a member or members of an organization referred to in d above.

k. Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to in a through i above. A close continuing association may be considered to exist if the individual lives at the same address as, frequently visits, or frequently communicates with such person.

l. Close continuing association of the type described in k above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

m. Any facts, other than as set forth in 2, below, which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of national security. Among matters which should be considered in this category would be the presence of a spouse, parent, brother, sister, or offspring in a nation, a satellite thereof, or an occupied area thereof, whose interests are inimical to the interests of the United States.

105A 2. *Separation Under Other Appropriate Directives or Regulations.*

Persons who fall within the criteria prescribed below are examples of members whose retention may not be clearly consistent with the interests of national security. However, action will not be initiated to separate them under this security program unless the criteria set forth in

VII, C, 1, above, is also substantially involved and action under other Armed Service directives or regulations or the Uniform Code of Military Justice has been determined to be inappropriate.

a. Willful violation or disregard of security regulations.

b. Intentional unauthorized disclosure to any person of classified information, or of other information disclosure of which is prohibited by law.

c. Any deliberate misrepresentation, falsification, or omission of material fact.

d. Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

e. All other behavior, activities, or associations which tend to show that the member is not reliable or trustworthy.

VIII. Administrative Policies.

The Secretary of each of the Armed Services will prescribe procedures to be taken within his department to implement this directive. Procedures so established shall be governed by the following:

A. Loyalty Certificate.

The following persons will be required to accomplish a DD Form 98 (Loyalty Certificate for Members of the Armed Forces).

1. Each applicant for appointment or enlistment before his appointment or enlistment.

2. Each member of a Reserve component of the Armed Services or retired member voluntarily entering into active military service with an Armed Service immediately prior to such entry.

106 3. Each inductee, member of a Reserve component of the Armed Services or retired member entering

into active military service other than voluntarily, and other non-volunteers prior to induction or immediately prior to entry on active duty.

B. *Application for Appointment.*

The completed DD Form 98 and DD Form 398, and where applicable DD Form 390, will be attached as an inclosure to the application for appointment. If an applicant fails or refuses to accomplish the DD Form 98 in its entirety his appointment will be denied. If the DD Form 98 is completed with qualification or entries are made thereon which provide reason for belief that his appointment is not clearly consistent with the interests of national security, such appointment will be held in abeyance and the application and allied papers will be processed as may be directed by the Secretary of the Armed Service concerned.

C. *Application for Enlistment.*

If an applicant for enlistment fails or refuses to accomplish the DD Form 98 in its entirety, his enlistment will be denied. If the DD Form 98 is completed with qualifications or entries are made thereon which provide reason for belief that his enlistment is not clearly consistent with national security, such enlistment will be held in abeyance and the application and allied papers will be processed as may be directed by the Secretary of the Armed Service concerned.

D. *Members of Reserve Components of the Armed Services.*

If a member of a Reserve component of any Armed Service voluntarily entering or being involuntarily called or ordered into active military service fails or refuses to accomplish the DD Form 98 in its entirety or makes entries thereon which provide reason for belief that his entry is not clearly consistent with the interests of na-

tional security, he will normally not be permitted to enter into active military service and procedures prescribed by the Secretary of the appropriate Armed Service with a view toward separation will be followed.

E. *Inductees.*

1. Known communists will not be inducted into the Armed Services.

106A 2. An inductee who refuses to accomplish satisfactorily the DD Form 98 in its entirety or who discloses significant derogatory information with respect to his background will be accepted into the service and retained on non-sensitive assignments in the lowest enlisted pay grade permitted by law, pending completion of a thorough investigation. In the event this investigation reveals that further retention would be inconsistent with the interests of national security, he will be separated under other than honorable conditions. Should the investigation disclose insufficient derogatory information to warrant separation in the interest of national security, he will be continued in the service and thereafter appropriately assigned. Upon termination of his obligated tour of duty, the character of separation shall be predicated upon the service performed.

F. *Separation of Members.*

1. Cases susceptible to resolution under court-martial procedure shall normally be so processed.

2. Where, for any reason, court-martial proceedings are inappropriate, impracticable, or inadvisable, administrative proceedings with a view toward separation of members whose continued service may not be clearly consistent with the interests of national security shall be initiated in accordance with applicable statutory authority.

3. In any administrative proceeding to separate a member of the Armed Services in the interest of national se-

curity, such member will be afforded an opportunity upon request to present any cause why he should not be so separated. Reasonable time will be afforded the member to present his cause; however, a period in excess of 15 days may be granted only in case of a showing of vital need.

4. Administrative procedure, as directed herein, shall not be trials or adjudications, but shall be directed to the end of obtaining factual findings and unbiased opinions by boards of officers that the members under investigation are, or are not, persons whose continued services are clearly consistent with the interests of national security. These recommendations are subject to review by the Secretary of the Armed Service concerned.

5. In cases where the approved findings and opinions of boards of officers indicate that the continued service of a member of the Armed Services is not clearly consistent with the interests of national security, he shall be separated and the character of the separation shall be predicated upon the gravity of the reasonably substantiated information in derogation.

107 6. In the case of separation of any member of the Armed Services, under conditions outlined in the preceding subparagraph, the DD Form 214 (Report of Separation) will cite as authority the appropriate Armed Service directive under which separation is effected.

7. If administrative proceedings hereunder culminate in findings by boards of officers, approved by competent departmental authority, to the effect that there is no reason for belief that retention of the member concerned is inconsistent with the interests of national security, such findings shall be conclusive and binding, and, may, in the absence of subsequently developed information substantially controverting the earlier findings, support assignment of the member to normal duties.

8. The actions and procedures adopted by each of the Armed Services in implementation of this directive shall emphasize and make specific provision for prompt and expeditious resolution of each case which may arise.

G. *Assignment Restrictions.*

During the period when a member of an Armed Service is under investigation for security reasons, and during the administrative processing of any case arising therefrom, the member will be placed under such restrictions with respect to assignments and access to classified information as are required to protect the interests of national security.

H. *Control of Investigative Information.*

The reports and other investigative material and information developed by investigations conducted pursuant to directives in implementation of this program shall remain the property of the investigative agencies conducting the investigations. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto to other departments and agencies conducting security programs without the prior approval of the Secretary of the Armed Service concerned.

I. *Cooperation with Investigative Agencies.*

All services will cooperate fully with Federal investigative agencies, and will avoid action tending prematurely to warn suspects that they are under suspicion or to compromise confidential sources of information. In cases presenting any substantial reason for belief that retention in the Armed Services may facilitate investigation and/or prosecution by Federal agencies, such retention may be effected notwithstanding any other provision of this directive. Similarly administrative procedures with a view

107A toward separation as directed herein may be withheld for a reasonable period pending completion of necessary investigation and advice by the investigative agency concerned that its missions will not be hampered by institution of such procedures.

IX. ACTION REQUIRED

Armed Service directives and regulations implementing this directive will be coordinated to insure uniformity with respect to methods, procedures, and safeguards and forwarded so as to reach this office not later than 60 days from the effective date of this directive.

X. EFFECTIVE DATE

The effective date of this directive is 7 April 1954.

C. E. WILSON
Secretary of Defense

108 **Affidavit**

County of Arlington }
State of Virginia } ss:

Hugh M. Milton, being duly sworn, deposes and says:

I am Assistant Secretary of the Army (for Manpower and Reserve Forces), Department of the Army, Washington, D. C. In this capacity, and under authority delegated to me by the Secretary of the Army, I reviewed the request of February 1, 1955, by counsel for John Henry Harmon III, to the Secretary of the Army that the character of Mr. Harmon's discharge be changed from Undesirable to Honorable. On July 5, 1955, under the authority of 60 Stat. 837, 5 U.S.C. 191a (1946), and 32 Code Fed. Regs. Section 581.3, promulgated thereunder, I referred this request together with Harmon's application for correction of military records to the Army Board for the Correction of Military Records. By letter of July 25, 1955, Mr. Har-

mon's counsel declined a hearing before the afore-mentioned Board because all the evidence and argument he wished to present had been offered before the Army Discharge Review Board. The Army Board for the Correction of Military Records then considered Mr. Harmon's application on the whole record and forwarded their recommendation to me, as delegate of the Secretary of the Army, for review as provided in 32 Code Fed. Regs. Section 581.3 (f)(2)(3). On November 10, 1955, after carefully reviewing the matter under criteria governing the Military Personnel Security Program at the time of Mr. Harmon's discharge, I approved the recommendation of the Army Board for the Correction of Military Records that Mr. Harmon's request be denied.

(s) Hugh H. Milton, II
Assistant Secretary of the Army

County of Arlington, State of Virginia ss:

Subscribed and sworn to before me this 14th day of November 1955.

My commission expires 7 September 1956.

(Signed) A. F. Spacla
Notary Public

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178 Filed November 23, 1955

Affidavit in Reply

State of New York)
County of New York) ss:

David I. Shapiro, being duly sworn, deposes and says:

I am a member of the Bar of the Court of Appeals of the State of New York, and the Supreme Court of the United States and one of the attorneys for John H. Harmon III, plaintiff in the within proceeding. I am fully familiar with all of the facts and circumstances involved

and make this affidavit in opposition to defendant's cross-motion for summary judgment, rather than plaintiff, inasmuch as plaintiff is now without the State of New York.

The Refusal to Appear Before the Army Board for the Correction of Military Records

On or about February 1, 1955, after the Army Board for the Correction of Military Records had, on January
179 27, 1955, refused to entertain plaintiff's application for a correction of his discharge certificate from "undesirable" to honorable, I wrote Hon. Robert T. Stevens, then the Secretary of the Army, requesting him to change plaintiff's discharge from "undesirable" to honorable. Annexed hereto and made a part hereof as plaintiff's Exhibit A is a copy of a letter from plaintiff's counsel to Robert T. Stevens dated February 1, 1955.

Thereafter and on February 4, 1955, I received a letter from Lt. Colonel Alfred Martin informing me that the matter had been turned over to the Assistant Secretary of the Army, Hugh M. Milton II, for reply, and that I would be advised as to what action the Army would take in connection with former Private Harmon's undesirable discharge. Annexed hereto and made a part hereof as plaintiff's Exhibit B is a photostatic copy of letter from Lt. Colonel Alfred Martin to plaintiff's counsel dated February 4, 1955. Thereafter plaintiff waited for a response from Mr. Milton and, hearing nothing further, commenced the within action in May, 1955.

On or about July 5, 1955, after plaintiff had filed the complaint herein, I received a communication from Mr. Milton concerning my letter of 1 February 1955 addressed to the Secretary of the Army. Annexed hereto as plaintiff's Exhibit C is a photostatic copy of a letter
180 from Hugh M. Milton II to plaintiff's counsel dated July 5, 1955. Thereafter and on July 7, 1955, I replied to Mr. Milton's letter of July 5, 1955, and informed

him that an action had been commenced by plaintiff in the District Court for the District of Columbia testing the validity of the undesirable discharge, but nevertheless offered to participate in a hearing before the Army Board for the Correction of Military Records. Annexed hereto as plaintiff's Exhibit D is a copy of a letter from plaintiff's counsel to Hugh M. Milton II, dated July 7, 1955. Thereafter and on or about July 20, 1955, I received another letter from Mr. Milton which informed me that the Executive Secretary of the Army Board for the Correction of Military Records had scheduled a hearing for 27 July 1955 in plaintiff's case; but that the Army could not agree that a discharge certificate must be based on the character of the soldier's service. Annexed hereto and made a part hereof as plaintiff's Exhibit E is a photostatic copy of a letter from Hugh M. Milton II, dated July 20, 1955. Thereafter and on July 25, 1955, and in accordance with Mr. Milton's letter of July 20, I wrote the Assistant Secretary of the Army that plaintiff would not appear before the Army Board for the Correction of Military Records inasmuch as it would appear that a hearing before said Board "would serve no useful purpose" inasmuch as the Army and plaintiff were in basic disagreement on the law relating to the issuance of discharge certifi-
181 cates. Annexed hereto and made a part hereof as plaintiff's Exhibit F is my letter to Hugh M. Milton, Assistant Secretary of the Army, dated July 25, 1955.

On or about November 10, 1955, the Assistant Secretary of the Army denied plaintiff's application for a correction of his military record. Annexed hereto as plaintiff's Exhibit G is a copy of the ruling of the defendant dated November 10, 1955.

Federal Benefits Denied by Reason of an Undesirable Discharge

In plaintiff's affidavit, duly sworn to August 17, 1955, and submitted in support of his motion for summary

judgment, plaintiff sets forth some of the benefits accorded veterans which he has been denied by reason of his Undesirable Discharge. I believe that a more exhaustive presentation may be helpful to the Court; accordingly, I am annexing hereto as plaintiff's Exhibit H a photostatic copy of a chart entitled "Incidents of Discharge," prepared in the Military Affairs Division, Office of the Judge Advocate General of the Army, which sets forth in detail all of the federal veterans' benefits which plaintiff has been deprived of.

Plaintiff was Discharged as Disloyal and/or Subversive under AR 615-370

On or about July 22, 1954, after plaintiff had filed an application for a change of his discharge from Un-
182 desirable to Honorable with the Army Discharge Review Board, I wrote a letter to Colonel James H. Hill, Office of the Adjutant General, Military Personnel Records Center, St. Louis, Missouri, requesting that the Discharge Review Board take immediate jurisdiction of plaintiff's application for change of his discharge certificate. In that letter, I informed Colonel Hill that "on the 2nd day of June, 1954, Private Harmon was given an undesirable discharge and was separated from the service at Transfer Point, Camp Pickett, Virginia, *under the authority of AR 615-370.*"

Prior to October 22, 1954, the date of former Private Harmon's "hearing" before the Army Discharge Review Board, I submitted a "Brief" to that Board, the opening sentence of which reads:

"This brief is submitted in the case of John H. Harmon III, formerly private, U.S. 51 207 184, who received an 'undesirable' discharge on June 2, 1954, *under the provisions of AR 615-370.*"

On or about November 29, 1954, after having been informed that the application had been denied, I wrote the

Adjutant General requesting "a copy of AR 615-370, under which Mr. Harmon received his 'undesirable' discharge on June 2, 1954 ..." I further pointed out that since an appeal was being made to the Army Board for the Correction of Military Records, "a copy of AR 615-370
183 would be most helpful." Annexed hereto as plaintiff's Exhibit I is a copy of a letter from me to the Adjutant General dated November 29, 1954. On or about December 17, 1954, I received a letter from the Adjutant General in which he stated: "There is also enclosed for your information a photostatic copy of Army Regulations 615-370." Annexed hereto as plaintiff's Exhibit J is a photostatic copy of a letter from the Adjutant General to me dated December 16, 1954.

On or about February 1, 1955, after the Army Board for the Correction of Military Records had denied an application for appeal, I wrote the Secretary of the Army (Exhibit A heretofore annexed) stating: "But on June 2, 1954, Private Harmon received an undesirable discharge and was separated from the service *under the authority of AR 615-370.*"

On or about July 20, 1955, pursuant to Mr. Milton's instructions, I received in my office a copy of a *Case Summary* prepared by Examiner Bernard Eisenberg for the Army Board for the Correction of Military Records. That case summary discloses that plaintiff's Service Record is marked: "Appl. was issued an undesirable discharge on 2 Jun 54, *UP AR 615-370.*" A copy of the case summary will be handed up to the Court on the argument of this motion.

Never once, prior to the time plaintiff's motion
184 for summary judgment was filed attacking defendant's answer as not complying with Rules 8(b) and 11 of the Federal Rules of Civil Procedure, was I, or plaintiff, or anyone else I know of, informed that plaintiff

was not discharged as disloyal or subversive under AR 615-370.

Sworn to before me this 22/day of November, 1955.

DAVID I. SHAPIRO
David I. Shapiro

HAROLD FRIEDMAN
Notary Public, State of New York
Qualified in Queens County
No. 41-6412025
Term Expires March 30, 1956

189 **Plaintiff's Exhibit "C"**

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
Washington 25, D. C.

In Reply Refer to:

July 5, 1955

Mr. David I. Shapiro
Dickstein. Shapiro & Friedman
Empire State Building
350 Fifth Avenue
New York 1, New York

Dear Mr. Shapiro:

This is in further reference to your letter of 1 February 1955, addressed to the Secretary of the Army, concerning the discharge of John H. Harmon, III, US 51 207 184.

Based on all information now available on the case of Mr. Harmon, it would appear that the initial action to effect his removal from the service with an undesirable discharge and that the subsequent action by the Army Discharge Review Board was consistent with the criteria established by the Department of Defense. This information may not, however, include all of the facts.

Accordingly, to insure that the ends of justice are served I have instructed the Army Board for the Correction of Military Records to undertake a fresh evaluation of the entire case. You will be informed in advance of the scheduled date for the hearing. At the hearing Mr. Harmon will have the opportunity to present in his own behalf any evidence he may wish to have considered.

Sincerely yours,

HUGH M. MILTON II.
Hugh M. Milton II
Assistant Secretary of the Army

190 **Plaintiff's Exhibit "D"**

July 7, 1955

Hon. Hugh M. Milton II
Assistant Secretary of the Army
Department of the Army
Office of the Assistant Secretary
Washington 25, D. C.

Re: Harmon, John H., III US 51 207 184

Dear Mr. Milton:

With respect to your letter of July 5, 1955, please be advised that during the month of May, 1955, an action was commenced by Mr. Harmon in the United States District Court for the District of Columbia, contesting the validity of his "Undesirable" Discharge.

Essentially, it is believed that since Mr. Harmon's service record bears character and efficiency ratings of "excellent," his discharge certificate must be changed from "Undesirable" to "Honorable." Examination of our file indicates that your office has all the facts in the case that we are aware of. As a matter of fact, we based our appeal to the Army Board for the Correction of Military Records on the testimony adduced before the Army Dis-

charge Review Board together with Mr. Harmon's service records, which were then before the Board. We have no additional facts to present on Mr. Harmon's behalf, except, of course, character testimony, but I do not believe such evidence germane to the issue.

It should be noted that while I hold no brief for Mr. Harmon's past political associations, nor his attempt to secure contributions from friends to aid the defense of two individuals indicted under the Smith Act, none of this seems pertinent to the issue in question. That is, that the discharge certificate must accurately and adequately reflect the character of Mr. Harmon's military service. Inasmuch as the character of his service, as set forth in his service record, is "excellent," he should have received an "Honorable Discharge."

191 If it is your belief that the Army Board for the Correction of Military Records is ready to accept this basic premise, which we consider to be the law, I most gratefully accept, on Mr. Harmon's behalf, your offer to participate in said Board's "fresh evaluation of the entire case." In the event I am mistaken with respect to the import of your letter, an appearance before the Board would appear to be pointless, since we should be unable to introduce additional evidence on the issue in question. Accordingly, I should appreciate your thinking on this matter so that I may advise the Department of Justice with respect to our future conduct in the litigation now pending in the District Court.

Very truly yours,

DICKSTEIN, SHAPIRO & FRIEDMAN

By:

DAVID I. SHAPIRO

DIS:LR

192 **Plaintiff's Exhibit "E"**

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
Washington, D. C.

July 20, 1955

David I. Shapiro, Esquire
350 5th Avenue
New York 1, New York

Dear Mr. Shapiro:

Reference is made to your letter dated 7 July 1955 wherein you request that the Army Board for Correction of Military Records consider the entitlement of Mr. John H. Harmon III to an honorable discharge based solely upon the character of his military service.

Under policies governing the Military Personnel Security Program, the Department of the Army cannot acquiesce in your request that the Board's consideration be thus limited. The Board's consideration will be based upon all material evidence of record, in order that a determination may be made relative to error or injustice in the instant case.

I have been informed by the Executive Secretary of the Board that Mr. Harmon's case has been scheduled for hearing at 9:00 A.M., Wednesday, 27 July 1955. It would be appreciated if you will advise the Board by registered mail whether or not you intend to appear on the scheduled date.

Sincerely yours,

HUGH M. MILTON II
Hugh M. Milton II
Assistant Secretary of the Army

193 **Plaintiff's Exhibit "F"**

July 25, 1955

Hugh M. Milton, II
Assistant Secretary of the Army
Office of the Assistant Secretary
Washington 25, D. C.

Re: John H. Harmon, III

Honorable Sir:

In view of your response dated 20 July, 1955 to my letter date 7 July, 1955, it would appear that a hearing before the Army Board for the Correction of Military Records would serve no useful purpose.

All of the evidence we have to offer has already been submitted to the Army Discharge Review Board. Our legal position has been set forth in our brief heretofore filed with that Board. All of this material is now in the hands of the Army Board for the Correction of Military Records.

Inasmuch as you point out that the Board may make a determination relative to error or injustice in the instant case, it certainly would have the power to do so on the basis of the record before it. Unfortunately we have no new evidence to present, for if we did, we would be most desirous of an opportunity to appear in person before the Board.

Accordingly, I am informing the Executive Secretary of the Army Board for the Correction of Military Records that all of our evidence and our legal position was set forth during the hearing before the Army Discharge Review Board and in view of our inability to furnish additional evidence with respect to the matters in question, we will not appear before the Board for the Correction of Military

Records on 27 July 1955, as we have no additional material to offer in support of our client's position.

Sincerely yours,

DAVID I. SHAPIRO

DIS:LR
cc: Executive Secretary
Army Board for the Correction of Military Records
Pentagon Bldg., Room 1E-512, Washington 25, D. C.
[Registered Mail, Return Receipt Requested]

194 **Plaintiff's Exhibit "G".**

DEPARTMENT OF THE ARMY
Washington 25, D. C.

14 November 1955

In Reply Refer to:
David I. Shapiro, Esquire
350-5th Avenue
New York 1, New York

Dear Sir:

Further reference is made to the application for correction of military record, submitted by your office in behalf of John H. Harmon III, US 51 207 184.

Under the provisions of Paragraph 21b, Army Regulations 15-185, 18 July 1955, there is inclosed a copy of the decision of the Assistant Secretary of the Army in the matter.

Sincerely yours,

GERALD C. COWDEN
Gerald C. Cowden
Executive Secretary
Army Board for Correction
of Military Records

Incl:
Memo dated 10 Nov 1955

195 Nov. 10, 1955

AG 201—HARMON, JOHN H., III
US 51 207 184

MEMORANDUM FOR THE ADJUTANT GENERAL:

Having approved the findings, conclusions and recommendation of the Army Board for Correction of Military Records in the case of JOHN H. HARMON III, US 51 207 184, and under the provisions of Section 207 of the Legislative Reorganization Act of 1946, as amended (Public Law 220, 82d Congress), and General Orders 67, dated 10 September 1954, it is directed:

That in the case of JOHN H. HARMON III, his application for correction of military records, dated 1 December 1954, be, and hereby is, denied.

(Sgd) HUGH M. MILTON II
Hugh M. Milton II
Assistant Secretary of the Army

Note

Page 58 is blank;
Page 59 is on Card 2;
Page 60 is blank.

197 **Plaintiff's Exhibit "T"**

November 29, 1954

Major General John A. Klein, U.S.A.
The Adjutant General
Department of the Army
Washington 25, D. C.

Re: AGPI-I 201 Harmon, John H. III.
US 51 207 184 (8 Jan 54)

Dear Sir:

I am in receipt of your communications of 15 November and 19 November, 1954, wherein you advise my client, John H. Harmon, III, that the Army Discharge Review Board has determined that he properly received a discharge as "undesirable" on 2 June, 1954, and that no change can be made in the type of discharge furnished.

On October 23, 1954, I requested a copy of the transcript of the proceedings before the Army Discharge Review Board and a copy of AR 615-370, under which Mr. Harmon received his "undesirable" discharge on 2 June, 1954, but I have not heard from you in this respect.

Inasmuch as my client intends to appeal to the Army Board for the Correction of Military Records, a transcript of the proceedings before the Army Discharge Review Board would be most helpful. However, and in the event I am not permitted to have a copy of the transcript, a copy of AR 615-370 would be most helpful.

Thank you for your many courtesies in this matter.

Very truly yours,

DICKSTEIN, SHAPIRO & FRIEDMAN
By:
DAVID I. SHAPIRO.

DIS:ag

198 **Plaintiff's Exhibit "J"**

DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL
Washington 25, D. C.

16 Dec. 1954

In Reply Refer to

AGRC-SC 201 Harmon, John H. III
US 51 207 284 (29 Nov 54)
Mr. David I. Shapiro
Dickstein, Shapiro & Friedman
Empire State Building
New York 1, New York

Dear Mr. Shapiro:

In response to your recent request, there is inclosed a copy of the proceedings before the Army Discharge Review Board in the case of your client, former Private John H. Harmon, III, service number US 51 207 184.

There is also inclosed for your information a photostatic copy of Army Regulations 615-370.

Sincerely yours,

JOHN A. KLEIN
John A. Klein
Major General, USA
The Adjutant General

2 Incl
1. Board Proceedings
2. AR 615-370 (photo)

Defendant's Exhibit 1

Filed in Open Court, November 28, 1955

PROCEEDINGS OF THE ARMY DISCHARGE REVIEW BOARD

22 October 1954

In the Case of

Former Private John H. Harmon III

hereinafter referred to as the APPLICANT

The Board was called to order. The Secretary-Recorder, Reporter, and the members of the Board were sworn.

Applicant elected to appear before the Board and testify in his own behalf. He designated as counsel, Mr. David I. Shapiro, Attorney-at-Law, Empire State Building, 350 Fifth Avenue, New York, and Associate Counsel, Mr. James Heller, Washington, D. C.

The authority under which it convened was read by the Secretary-Recorder. Applicant was asked if he desired to challenge any member of the Board for cause, and he replied in the negative.

The applicant was given full opportunity to be present during all open sessions of the Board to present evidence in his behalf, testify in person, or submit a written statement or brief.

The following evidence was introduced in the record and is appended hereto as:

Exhibit "B"—Application for Review of Discharge DD Form No. 293.

Exhibit "C"—Brief of Applicant's 201 File.

Secretary-Recorder: In giving evidence in support of a change in the type of your separation from the Army, do you wish to testify under oath or do you prefer to make an unsworn statement?

Applicant: I wish to testify under oath.

(Secretary-Recorder placed applicant under oath)

Presiding Officer: Mr. Harmon, you may now proceed, under the guidance of your counsel, Mr. Shapiro, and asso-

ciate counsel, Mr. Heller, to present such evidence as you desire in your appeal for a change in the type of your discharge.

Counsel: Mr. Harmon, are you now or have you ever been a member of the Communist Party?

Applicant: No, I have not.

Counsel: Are you now or have you ever been a member of any communistic organization?

Applicant: No, I have not.

Counsel: Now, when you were stationed at Indiantown Gap Military Reservation at Indiantown Gap, Pennsylvania, you refused to answer that question under Article 31 on the grounds of possible self incrimination. Will you please tell the Board why you refused to answer the question?

Applicant: Well, quite frankly, I was afraid for one reason and, secondly, I did not have the advice of counsel, I was afraid in the sense that when I was first sent up to Indiantown Gap I was awakened from sleep and introduced to six gentlemen from the Counter Intelligence Corps, and that included the Commanding Officer, a stenographer, and a Sergeant-at-Arms, and I was searched and then taken down to G-2 headquarters and there I was questioned by the battery of these gentlemen from the Counter Intelligence Corps. I did not feel that I could truthfully and honestly answer all the questions that were presented to me—when they were thrown at me in such rapid fire.

Counsel: Mr. Harmon, did you know at the time that you were questioned by these gentlemen what organizations had been listed by the Attorney General of the United States as subversive or communistic or fascist, under the provisions of Executive Order No. 10450, which provided for a list of these organizations?

Applicant: Frankly, no, sir. The only time I had ever really seen a list of subversive organizations was when I was first inducted. At the time that I was questioned I was not aware of all the organizations on the list, and I

could not see them, and I refused to answer under Article No. 31, whether I had belonged to any organization or association with any of them. However, after my discharge and securing counsel, my counsel, Mr. Shapiro, showed me a list of these organizations, and I do not believe that I have ever belonged to or associated with any of these organizations. However, I was informed by The Adjutant General's Office that the Detroit Urban League was supposed to be a subversive organization. I have belonged to the National Association for Advancement of Colored People, I don't know, even they may be now a subversive organization.

Counsel: And, are those the reasons that you refused to answer that question under Article 31?

Applicant: Yes, they are.

Counsel: Let's continue with the rest of the questions. Are you now or have you ever been a member of any organization, association, movement, group or combination of persons which advocates the overthrow of our constitutional form of government?

Applicant: No, I have not.

Counsel: Are you now or have you ever been a member of an organization, association, movement, group or combination of persons which advocates the overthrow of our constitutional form of government, or of an organization, association, movement, group or combination of persons which had adopted the policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or of seeking to alter the form of government of the United States by unconstitutional means?

Applicant: No, I have not.

Counsel: Are you now or have you ever been a member of any organization, association, movement, group or combination of persons which seek to alter the form of government of the United States by unconstitutional means?

Applicant: No, I have not.

Counsel: Are you now or have you ever knowingly and willingly been a member of any organization, association, movement, group or combination of persons which to your knowledge have engaged in subversive activities in any nature?

Applicant: I don't believe so.

Counsel: Have you ever given financial support to any communistic organization?

Applicant: Yes, I have.

Counsel: Will you explain that?

Applicant: It was brought out, I think, in the interrogation at Indiantown Gap in May of 1953, that I did solicit funds for the defense of persons under the Smith Act.

Counsel: Who were these persons?

Applicant: They were the husbands of Gertrude Schotz and Peggy Wellman.

Counsel: Who are Gertrude Schotz and Peggy Wellman?

Applicant: Gertrude Schotz and Peggy Wellman, they were employees, and Peggy Wellman was a waitress and Gertrude Schotz was, I believe, in the child camp at Camp Lakeland where I worked during the summer of 1951 and 1952.

Counsel: And, you heard that their husbands were indicted under the Smith Act?

Applicant: Yes, sir, it came to my attention, I think it was through the newspapers.

Counsel: What was the financial condition of Mrs. Schotz and Mrs. Wellman, do you know?

Applicant: Well, just off hand I would say that financially they probably weren't in position to fight effectively, that is, in terms of financial support to clear their husbands of indictment rendered against them.

Counsel: Well, why do you think that you should assist them in getting financial support for their husbands?

Applicant: Well, I have believed and still do that a person is innocent of any charges presented against him until proven otherwise. Even a murderer is entitled to this defense.

Counsel: May I ask you this question, Mr. Harmon, in peaking of any financial support given to any communist rganization or communist person, was the question of oliciting funds for two individuals, I believe, whose hus-ands had been indicted under the Smith Act, and you had een familiar and friendly with these individuals wives t a place called Camp Lakeland, is that correct?

Applicant: Yes, that is correct.

Counsel: And that is the extent of any financial support ou have given to any communist organization or any ommunist member?

Applicant: Yes, it is.

Counsel: Are you a member of any communist cell or nit?

Applicant: No, I am not.

Counsel: You have not, I take it, solicited funds for the ommunist Party itself?

Applicant: No, I have not.

Counsel: And, I also take it, that at no time have you olicited funds for any communist cause other than for the upport of these individuals you mentioned who were in-icted under the Smith Act?

Applicant: That is correct.

Counsel: Have you at any time solicited funds for any rganization which advocates violence or forceful over-hrow of the United States Government?

Applicant: No, I have not.

Counsel: Would you in the defense of the United States f America bear arms and fight against any communist ominated enemy in a time of a national emergency?

Applicant: Yes, I would.

Counsel: Have you at any time given any pledge or llegiance to the aims and policy of the Soviet Union?

Applicant: No, I have not.

Counsel: Have you in any manner or at any time pledged ourself to defend the Soviet Union?

Applicant: No, I haven't.

Counsel: You have stated under oath that if this nation were in conflict with the Soviet Union, you would defend the United States and fight against a communist enemy or communist influenced enemy, or any other enemy of the United States because of patriotic motives or perhaps you wouldn't want to get yourself in any trouble or subject yourself to disciplinary action?

Applicant: No, I would defend the United States motivated by patriotic motives.

Counsel: What do you mean by that? Will you explain that to the Board?

Applicant: I think the same question or a similar question was put to me when I was interrogated in May of 1953, and I declined to answer invoking Article No. 31, Uniform Code of Military Justice. I did so at the time simply because I felt that loyalty and willingness to defend one's country regardless is implicit or implied in citizenship, and I did do it, and it would come as a second nature, really.

Counsel: Mr. Harmon, prior to the time you were inducted into the Army, did you ever commit an unlawful act of any kind?

Applicant: No, I never did.

Counsel: While you were in the service, did you ever commit an unlawful act or acts in violation of any Army Regulation to your knowledge?

Applicant: To my knowledge, I did not. I might explain that I was involved in an automobile accident and in the investigating of the accident, not in line of duty, but not due to my own misconduct, but other than that, no, I never did.

Counsel: As I understand it, your service record with respect to the only comments on your character and on your efficiency, only ones marked as known are marked as excellent. Have you ever had any reason to believe anyone might indicate that the character of your service or your conduct or your deportment, while in the service of

the United States, as a member of the United States Army, was there any other form subject to criticism or disciplinary action or disciplinary proceedings of any kind?

Applicant: No, sir, I was inducted into service and it became just like another job to me, and in order to get ahead you have to work, and I gave what I thought was my best, and I was never aware of any indication that my service was in any way undesirable or lacking.

Counsel: Mr. Harmon, do you believe that you are a completely unswerving loyal citizen of the Government of the United States?

Applicant: I say definitely so.

Counsel: Why do you say that?

Applicant: Well, it is really something hard to explain, but yet we have in this country what we call liberty and freedom and equality of opportunities for all, and having read the Constitution more than once, it has been very meaningful to me. The United States—living here is all that I have ever known and I'll tell you that I was born in Texas, you know, and that is perhaps the only loyalty I have which is greater than that to the United States, but other than that my loyalty is unswerving, but we don't improve, we criticize our own weak points.

Counsel: In your own mind, do you believe that you are completely and unswervingly loyal?

Applicant: In my own mind, yes.

Counsel: You would not hesitate to lay down your life in defense of this country against any and all enemies whatsoever?

Applicant: No, I would not.

Counsel: I have no other questions.

Presiding Officer: Does the associate counsel have anything to offer?

Associate Counsel: No, sir.

Presiding Officer: Any questions by the members of the Board?

Member: Mr. Harmon, were you ever or are you now a member of the Detroit Urban League?

Applicant: No, sir, I was not and I am not now.

Member: At the time of your induction, did you make out a Form No. 98 and 98-A?

Applicant: Is that the form with the list of organizations?

Member: That is correct?

Applicant: Yes, sir.

Member: Did you consider that it was your duty when you were at Camp Lakeland to solicit funds for Mrs. Wallman and Mrs. Schotz, weren't there other people there that could have done it as well as you?

Applicant: Undoubtedly so.

Member: Why did you consider it your duty?

Applicant: I might explain, when I was in school I was once ill and the hospital bills were such that I could not have paid it myself, and people unknown to me came forward with a contribution to help defray the expenses.

Member: Who were these people?

Applicant: I don't know.

Member: You still don't know?

Applicant: No, never knew who the e people were.

Member: How much money was contributed at the time you were in the hospital?

Applicant: I think it was pretty close to one hundred and ninety-eight dollars.

Member: You have no idea from whence this money came?

Applicant: I have my idea but I have nothing concrete to go on, I don't know who the people were or the amount of the contributions, and in a like manner I had known these two women and I had read in the newspapers that their husbands were indicted, and it was just a showing of friendship and I attempted to solicit funds in the defense of their husbands.

Member: At the time you were in the hospital, you say you have an idea of the people who contributed the funds to you in this hospital, or do you know if any of those

people were ever affiliated with any communist front organization?

Applicant: In my opinion, no, sir.

Member: Mr. Harmon, on the 7th of May 1953 you were asked certain questions in regard to which have been repeated this morning by your counsel, and at that time you refused to answer those questions, and you tell us this morning you refused based on the fact that you did not have advice of counsel, and you did not know the names of all the organizations that might be listed on the Attorney General's list. I am willing to grant that probably nobody can recall the names of those organizations, but it is inconceivable to me that a man doesn't know whether or no he belonged to an organization that would use acts of force or violence in the overthrow of our form of government, or any other questions they asked you there?

Applicant: Well . . .

Member: I don't see why you had to have advice of counsel to say you did not belong to them?

Applicant: Well, sir, I will give you an example. When I was interrogated in May of 1953, I mentioned that I was asked questions all at once, and some of the questions ran to this extent. To whom have you given the plans of Indiantown Gap Military Reservation? How long have you been a courier for the Soviet Union or to some of its satellites? My instant reaction was, what is going on here, you know. I hadn't realized that I was such a cloak and dagger personality. I say that I was afraid, and really being fearful I did not wish to answer these questions for fear I might say something which was not actually the truth.

Member: For example, when you were asked the question whether you had knowingly or willingly supported the platform of the Communist Party or were a member of the Soviet Union, certainly you knew at the time whether or not you have ever supported the communist doctrine or the communist platform, did you not?

Applicant: No, sir, I couldn't say that because frankly I am not familiar with all the platforms or policies of the Communist Party, and it might be quite conceivable that some of the things the Communist Party or its front organizations try to put over, might just be that I have the same ideas.

Member: You knew whether or not you were a member of the Communist Soviet Union, did you not?

Applicant: Yes, sir.

Member: Why did you refuse to answer that?

Applicant: I answered the question as to whether I had been a member of the Communist Party in the United States of America. I refused to answer that question, I think, well, I didn't know what to think, sir.

Member: You were also asked whether communistic teachings were propagated at Comp Lakeland and you refused to answer that, why?

Applicant: I can only say again, it is quite possible that communistic teachings may have been taught and advocated at Camp Lakeland, but I don't believe they were. It is quite possible but I didn't, at that time, wish to commit myself without putting in certain other facts.

Member: You could certainly say, not to my knowledge?

Applicant: Yes, sir, I could have.

Member: Well, Mr. Shapiro asked you this question, in time of a national emergency, would you in the defense of the United States of America fighting against a communist dominated enemy or a communist influenced enemy, because of patriotic motives or because you didn't want to subject yourself to disciplinary action. I didn't quite understand your reply, would you give me the answer to that question again?

Applicant: Surely, sir. I would do so, I would fight to preserve the principles of this country on any given occasion, if I were called upon to do so. If we were directly threatened each of us would have to defend the country the best way we knew how. I believe when I

was questioned on that point in May 1953, the person who questioned me made the question appear, that we know you are such and such, Harmon, come out with it and say you would only fight because you would be forced to do so. That isn't so. It is my thought or impression that whatever actions are necessary to defend a principle, you go ahead and do it, don't have to shout to the roof top about it.

Member: I understand your reply to that question is, you would do it for patriotic motives?

Applicant: Yes, sir.

Presiding Officer: Mr. Harmon, were you employed at Camp Lakeland in 1951 and 1952?

Applicant: Yes, sir, I was employed at Camp Lakeland.

Presiding Officer: In what capacity?

Applicant: In 1951, sir, I was a kitchen helper, and in 1952 I was assistant breakfast cook.

Presiding Officer: How did you get this job?

Applicant: I was looking around for summer employment in 1951, and I was introduced to Sol Vail, who was at that time the manager of the camp.

Presiding Officer: Who introduced you to Mr. Vail?

Applicant: My father introduced me to Mr. Vail, and he mentioned he had a position open in the kitchen and that was the type of work I had done while going through school, and I was subsequently hired as a kitchen helper.

Presiding Officer: Now, Mr. Harmon, were there any communist activities at Camp Lakeland while you were so employed there to your knowledge?

Applicant: No, sir, I don't believe so.

Presiding Officer: To the best of your knowledge there were not?

Applicant: No, sir.

Presiding Examiner: While there you met Peggy Wellman and Mrs. Schotz, is that correct?

Applicant: Yes, sir.

Presiding Officer: They were both employed there?

UNDESIRABLE DISCHARGE

FROM THE ARMED FORCES OF THE UNITED STATES OF AMERICA

THIS IS TO CERTIFY THAT

JOHN HENRY HARMON III US 51 207 184 Private E-1 AUS

WAS DISCHARGED FROM THE

ARMY OF THE UNITED STATES

ON THE 2nd DAY OF June 1954

AS UNDESIRABLE

WALTER A KUHNS
Major AGC

DD FORM 1 MAY 50 258A

PLAINTIFF'S EXHIBIT 1

14

D-17

REPORT OF SEPARATION FROM THE ARMED FORCES OF THE UNITED STATES

CHARACTER OF SEPARATION: **UNDESIRABLE**

DEPARTMENT: **ARMY**

SEPARATION DATA

1. LAST NAME – FIRST NAME – MIDDLE NAME	2. SERVICE NUMBER	3. GRADE – RATE – RANK AND DATE OF APPOINTMENT	4. COMPONENT AND BRANCH OR CLASS
Harmon, John Henry III	US 51 207 184	Pvt-1(P) 2 Jun 54	AUS TC

5. QUALIFICATIONS: SPECIALTY NUMBER OR SYMBOL	RELATED CIVILIAN OCCUPATION AND D. O. T. NUMBER	6. EFFECTIVE DATE OF SEPARATION: DAY	MONTH	YEAR	7. TYPE OF SEPARATION
1824	Cook 02-26.31	2	June	54	Discharge

8. REASON AND AUTHORITY FOR SEPARATION	9. PLACE OF SEPARATION
AR 615-370	Transfer Point, Camp Pickett, Virginia

10. DATE OF BIRTH: DAY	MONTH	YEAR	11. PLACE OF BIRTH (City and State)	12. DESCRIPTION: SEX	RACE	COLOR HAIR	COLOR EYES	HEIGHT	WEIGHT
17	Jul	31	Houston, Texas	Male	Negro	Black	Brown	5'9"	155

SELECTIVE SERVICE DATA

13. REGISTERED: YES	NO	SELECTIVE SERVICE NUMBER	14. SELECTIVE SERVICE LOCAL BOARD NUMBER (City, County, State)	15. INDUCTED: DAY	MONTH	YEAR
X		50 16 31 304	LB 16, New York, New York	31	Oct	52

16. ENLISTED IN OR TRANSFERRED TO A RESERVE COMPONENT: YES	NO	COMPONENT AND BRANCH OR CLASS	COGNIZANT DISTRICT OR AREA COMMAND
	X	Not Applicable	Not Applicable

17. MEANS OF ENTRY OTHER THAN BY INDUCTION: ☐ ENLISTED ☐ REENLISTED ☐ COMMISSIONED ☐ CALLED FROM INACTIVE DUTY

18. GRADE – RATE OR RANK AT TIME OF ENTRY INTO ACTIVE SERVICE: pvt-1

19. DATE AND PLACE OF ENTRY INTO ACTIVE SERVICE: DAY	MONTH	YEAR	PLACE (City and State)	20. HOME ADDRESS AT TIME OF ENTRY INTO ACTIVE SERVICE (St., R.F.D., City, County and State)
31	Oct	52	New York, New York	Box 77, Bucknell University, Lewisburg, Pa.

SERVICE DATA

STATEMENT OF SERVICE FOR PAY PURPOSES	A. YEARS	B. MONTHS	C. DAYS
21. NET ( ) SERVICE COMPLETED FOR PAY PURPOSES EXCLUDING THIS PERIOD	Not	Applicable	
22. NET SERVICE COMPLETED FOR PAY PURPOSES THIS PERIOD	1	7	2
23. OTHER SERVICE (Act of 16 June 1942 as amended) COMPLETED FOR PAY PURPOSES	0	0	0
24. TOTAL NET SERVICE COMPLETED FOR PAY PURPOSES	1	7	2

25. ENLISTMENT ALLOWANCE PAID ON EXTENSION OF ENLISTMENT, IF ANY: DAY / MONTH / YEAR / AMOUNT: Not Applicable

26. FOREIGN AND/OR SEA SERVICE: YEARS 0 / MONTHS 0 / DAYS 0

27. DECORATIONS, MEDALS, BADGES, COMMENDATIONS, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED: None

28. MOST SIGNIFICANT DUTY ASSIGNMENT	29. WOUNDS RECEIVED AS A RESULT OF ACTION WITH ENEMY FORCES (Place and date, if known)
56th Trans Co (Lt Trk)(Army)	None

30. SERVICE SCHOOLS OR COLLEGES, COLLEGE TRAINING COURSES AND/OR POST-GRAD. COURSES SUCCESSFULLY COMPLETED	DATES (From-To)	MAJOR COURSES	31. SERVICE TRAINING COURSES SUCCESSFULLY COMPLETED
None	None	None	All Basic Training

INSURANCE AND PAY DATA

GOVERNMENT INSURANCE INFORMATION: (A) Permanent plan premium must continue to be paid when due, or within 31 days thereafter, or insurance will lapse. (B) Term insurance not under waiver same as (A) above. (C) Term insurance under waiver – premium payment must be resumed within 120 days after separation. Forward premiums on NSLI to Veterans Administration District Office having jurisdiction over the area shown in Item 47. Forward premiums on USGLI to Veterans Administration, Washington 25, D. C. (See VA Pamphlet 9-3). When paying premiums give full name, address, Service Number, Policy Number(s), Branch of Service, date of separation. Contact nearest VA office for information concerning Government Life Insurance.

32A. KIND & AMT. OF INSURANCE & MTHLY. PREMIUM	32B. ACTIVE SERVICE PRIOR TO 26 APRIL 1951	33. MONTH ALLOTMENT DISCONTINUED	34. MONTH NEXT PREMIUM DUE
None Indemnity	☐ YES ☒ NO ☐ UNKNOWN	Not Applicable	Oct 54

35. TOTAL PAYMENT UPON SEPARATION	36. TRAVEL OR MILEAGE ALLOWANCE INCLUDED IN TOTAL PAYMENT	37. DISBURSING OFFICER'S NAME AND SYMBOL NUMBER
Not Applicable	Not Applicable	Not Applicable

AUTHENTICATION

38. REMARKS (Continue on reverse)
Blood Group "B"
No days lost under sec 6(a) App 2b MCM, 1951.

39. SIGNATURE OF OFFICER AUTHORIZED TO SIGN

NAME, GRADE AND TITLE (Typed)
JOHN T. DALY
CWO USA
Asst Adj Gen

40. V A BENEFITS PREVIOUSLY APPLIED FOR (Specify type)
COMPENSATION, PENSION, INSURANCE BENEFITS, ETC.: None
CLAIM NUMBER: None

PERSONAL DATA

41. DATES OF LAST CIVILIAN EMPLOYMENT: FROM	TO	42. MAIN CIVILIAN OCCUPATION	43. NAME AND ADDRESS OF LAST CIVILIAN EMPLOYER
None		None	Not Applicable

44. UNITED STATES CITIZEN	45. MARITAL STATUS	46. NON-SERVICE EDUCATION (Years successfully completed): GRAM-MAR	HIGH SCHOOL	COL-LEGE	DEGREE(S)	MAJOR COURSE OR FIELD
☒ YES ☐ NO	single	8	4	4	BA	Political Science

47. PERMANENT ADDRESS FOR MAILING PURPOSES AFTER SEPARATION (St., R.F.D., City, County and State)	48. SIGNATURE OF PERSON BEING SEPARATED
601 E. 226th St. Bronx New York	John Henry Harmon III

ALL ENTRIES APPLY TO CURRENT PERIOD OF SERVICE (unless otherwise indicated)

DD FORM 1 JUL 52 214 EDITION OF 1 JAN 50 IS OBSOLETE. **INDIVIDUAL'S COPY** (TO BE DELIVERED TO THE INDIVIDUAL BEING SEPARATED)

1

PLAINTIFF'S EXHIBIT 2

INCIDENTS OF DISCHARGE

	HONORABLE	GENERAL	UNDESIRABLE	DISCHARGE**** (under other than honorable conditions)	BAD CONDUCT DISCHARGE ADJUDGED BY SCM	BAD CONDUCT DISCHARGE ADJUDGED BY GCM	DISHONORABLE **	RESIGNATION FOR THE GOOD OF THE SERVICE IN LIEU OF COURT-MARTIAL***	AUTHORIZATION FOR BENEFIT
Authority for Discharge	AR 615-360 (EM) SR 605-290-1 (Officers)	AR 615-360 (EM) SR 605-290-1 (Officers)	AR 615-360 (EM)	SR 605-290-1 (Officers)	Sentence of either a general or special court-martial	Sentence of either a general or special court-martial	Sentence of general court-martial (Dismissal by sentence of general court-martial is equivalent to dishonorable discharge)	AR 605-275 (Officers) SR 605-290-1(Officers) (The provisions of SR 605-290-1, 17 June 1952, apply to all officers of the Army; and SR 140-175-1, 9 March 1953 provide that Reserve officers being separated will be furnished discharge certificates in accordance with SR 605-290-1)	
Conditions under which issued	Convenience of The Government; Expiration of enlistment; Minority; Resignation; Dependency or hardship; Disability; Revocation or termination of appointment; Discharge to accept appointment	Convenience of the Government; Disability, disloyal or subversive; Expiration of enlistment; Inaptitude; Minority; Resignation-Unsuitability; Homosexuality	Misconduct; Homosexuality; Qualified resignation; unfitness; Disloyal and subversive; Disability	Qualified resignation; Unsuitability and misconduct; Conviction of felony by civil authorities; Homosexuality; Physical disability					
Benefits Administered by the Army									
Headstone Marker	Eligible	Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Section 1, act of 1 July 1948 (62 Stat. 1215; 24 U.S.C. 279a)
Mustering-out Payments	Eligible	Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Mustering-Out Payment Act of 1944 (58 Stat. 8), as amended (38 U.S.C. 691 et seq.); Title V, Veterans' Readjustment Assistance Act, 1952 (66 Stat. 688)
Payment for Accrued Leave	Eligible	Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Armed Forces Leave Act of 1946 (60 Stat. 963), as amended (37 U.S.C. 32 et seq.
Retirement Pay for Reserves under title III, act of 29 June 1948 (62 Stat. 1087)	Eligible	Eligible	Eligible	Eligible	Eligible	Eligible	Eligible	Eligible	Title III, Army and Air Force Vitalization and Retirement Equalization Act of 1948 (62 Stat. 1087), as amended (10 U.S.C. 1036 et seq.)
Transportation Allowance for Dependents and Shipment of Household Goods	Eligible	Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Paragraphs 7000, 8009(5), Joint Travel Regulations
Transportation in Kind	Eligible	Eligible	Eligible	Eligible	Eligible	Eligible	Eligible	Eligible	Paragraph 5300, Joint Travel Regulations
Burial in National Cemetery	Eligible	Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Section 1, act of 14 May 1948 (62 Stat. 234; 24 U.S.C. 281)
Use of Wartime Title; Wear of Uniform of Wartime Grade upon Occasions of Ceremony	Eligible	Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Section 2, act of 21 June 1930 (c.563, 46 Stat. 793; 10 U.S.C. 1028b)
Admission to Soldiers' Home *****									
Benefits Administered by the Veterans' Administration ******									
Compensation for Service Connected Disability	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Act of 20 March 1933 (48 Stat.8), as amended (38 U.S.C. 701 et seq.) Act of 11 May 1951 (c.49, 65 Stat.40; 38 U.S.C. 745) Veterans Regulation No. 1(a), as amended, Parts I and II (38 U.S.C. Note Chapter 12)
Pension for Non-Service-Connected Disability	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Act of 20 March 1933 (48 Stat.8), as amended (38 U.S.C. 701 et seq.) Act of 11 May 1951 (c.49, 65 Stat.40; 38 U.S.C. 745) Veterans Regulation No. 1(a), as amended, Part III (38 U.S.C. Note Chapter 12)
Vocational Rehabilitation	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Veterans Regulation No. 1(a), as amended, Part VII (38U.S.C. Note Chapter12) Act of 28 December 1950(c.1176, 64 Stat.1121), as amended(38U.S.C. 701a) Title II, Veterans' Readjustment Assistance Act of 1952 (66Stat.663)
Education and Training	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Veterans Regulation No. 1(a), as amended, Part VIII (38 U.S.C. Note Chapter 12) Title II, Veterans' Readjustment Assistance Act of 1952(66 Stat. 663)
Loans	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Title III, Servicemen's Readjustment Act, 1944 (58 Stat.291), as amended (38 U.S.C. 694 et seq.); Title III, Veterans' Readjustment Assistance Act of 1952 (66 Stat.682)
Unemployment Compensation	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Title V, Servicemen's Readjustment Act of 1944 (58Stat.295), as amended (38 U.S.C. 696 et seq.)
Special Housing	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Veterans Regulation No. 1(a), as amended, Part IX (38 U.S.C. Note Chapter 12)
Hospitalization	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Section 6, act of 20 March 1933 (48 Stat.9), as amended (38 U.S.C. 706) Act of 11 May 1951 (c.49, 65 Stat.40; 38 U.S.C. 745); Veterans Regulation No. 6(a), as amended (38 U.S.C. Note Chapter 12)
Domiciliary Care	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Section 6, act of 20 March 1933 (48 Stat.9), as amended (38 U.S.C. 706) Act of 11 May 1951 (c.49, 65 Stat.40; 38 U.S.C. 745); Veterans Regulation No. 6(a), as amended (38 U.S.C. Note Chapter 12)
Out-Patient Medical Treatment	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Section 6, act of 20 March 1933 (48 Stat.9), as amended (38 U.S.C. 706) Veterans Regulations Nos. 6(a) and 7(a), as amended (38 U.S.C. Note Chapter 12)
Out-Patient Dental Treatment	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Veterans Regulation No. 7(a), as amended (38 U.S.C. Note Chapter 12)

INCLOSURE 3 TO AFFIDAVIT

General Discharge

Under Honorable Conditions
from the Armed Forces of the United States of America

This is to certify that

JOHN HENRY HARMON III US51 207 184 Private AUS

was Discharged from the

Army of the United States

on the 2d day of June 1954 under honorable conditions

R L RICHSTATTER
Captain Adjutant General's Corps

DD FORM 1 NOV 48 257A

Special Housing	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Veterans Regulation No. 1(a), as amended, Part IX (38 U.S.C. Note Chapter 12)
Hospitalization	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Section 6, act of 20 March 1933 (48 Stat.9), as amended (38 U.S.C. 706) Act of 11 May 1951 (c.49, 65 Stat.40; 38 U.S.C. 745); Veterans Regulation No. 6(a), as amended (38 U.S.C. Note Chapter 12)
Domiciliary Care	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Section 6, act of 20 March 1933 (48 Stat.9), as amended (38 U.S.C. 706) Act of 11 May 1951 (c.49, 65 Stat.40; 38 U.S.C. 745); Veterans Regulation No. 6(a), as amended (38 U.S.C. Note Chapter 12)
Out-Patient Medical Treatment	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Section 6, act of 20 March 1933 (48 Stat.9), as amended (38 U.S.C. 706) Veterans Regulations Nos. 6(a) and 7(a), as amended (38 U.S.C. Note Chapter 12)
Out-Patient Dental Treatment	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Veterans Regulation No. 7(a), as amended (38 U.S.C. Note Chapter 12)
Prosthetic Appliances	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Section 4, act of 19 July 1939 (53Stat.1070), as amended (38U.S.C.706b)
Seeing-Eye Dogs and Mechanical Electronic Equipment	(Eligibility dependent upon entitlement to disability compensation)					Not Eligible	Not Eligible	Not Eligible	Section 1, act of 24 May 1944 (58Stat.226; 38 U.S.C. 251)
Automobiles	(Eligibility dependent upon entitlement to disability compensation for one of specified disabilities)					Not Eligible	Not Eligible	Not Eligible	Section 101, act of 8 August 1946 (60Stat.915; 38 U.S.C.252) Section 1, act of 20 October 1951 (65 Stat.574;38 U.S.C. 252a)
Compensation for Service-Connected Death	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Act of 20 March 1933 (48Stat.8), as amended (38 U.S.C. 701 et seq.) Veterans Regulation No. 1(a), as amended, Parts I and II (38 U.S.C. Note Chapter 12)
Pension for non-Service-Connected Death	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Act of 20 March 1933 (48Stat.8), as amended (38U.S.C. 701 et seq.) Veterans Regulation No. 1(a), as amended, Part III (38 U.S.C. Note Chapter 12)
Burial Expenses	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Section 17, act of 20 March 1933 (48 Stat.11; 38 U.S.C. 717) Act of 11 May 1951 (c.49,65 Stat. 40;38 U.S.C. 745)
Burial Flags	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Section 1, act of 22 November 1943 (c.301,57 Stat.590;36 U.S.C. 183)
Benefits Administered by Other Federal Agencies									
Farm and Farm Housing Loans (Department of Agriculture)	Eligible	Eligible	Eligible	Eligible	Eligible	Eligible	Not Eligible	Eligible	Bankhead-Jones Farm Tenant Act (50 Stat. 522), as amended (7 U.S.C. 1001 et seq; section 2, act of 30 June 1953 (Pub.Law 98, 83d Cong; 67 Stat. 132); Title V, Housing Act of 1949 (63 Stat.432), as amended (42 U.S.C. 1471 et seq; section 3, act of 30 June 1953 (Pub.Law 98, 83d Cong; 67 Stat.132)
Preference in Housing (Defense Rental Areas Division, Office of Defense Mobilization)	Eligible	Eligible	Eligible	Eligible	Eligible	Eligible	Not Eligible	Eligible	Section 4, Housing and Rent Act of 1947 (61 Stat.195), as amended (50 U.S.C. App. 1884; subsection 201(a), Defense Production Act Amendments of 1952 (66 Stat.306); Section 2, Housing and Rent Act of 1953 (Pub. Law 23, 83d Cong; 67 Stat.24))
Homestead, Desert Land and Small Tract Preference (Department of Interior)	Eligible	Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Section 1, act of 27 September 1944 (c.421,58 Stat.747), as amended (43 U.S.C. 279)
Civil Service Preference (Civil Service Commission)	Eligible	Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Section 2, Veterans' Preference Act of 1944 (58 Stat.387), as amended (5 U.S.C. 851; section 1, act of 14 July 1952 (c.728,66 Stat.626)
Reemployment Benefits-Federal Employment (Civil Service Commission)	Eligible	Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Section 9, Universal Military Training and Service Act (62 Stat.614), as amended (50 U.S.C. App.459); Part 35, Civil Service Commission Regulations
Reemployment Benefits-Private Employment (Department of Labor)	Eligible	Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Section 8, Selective Training and Service Act of 1940 (54 Stat.890), as amended (50 U.S.C. App.308); Section 9, Universal Military Training and Service Act (62 Stat.614), as amended (50 U.S.C. App. 459)
Employment Preference (Department of Labor)	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Title IV, Servicemen's Readjustment Act of 1944 (58 Stat.293) as amended (38 U.S.C. 695 et seq.)
Unemployment Compensation - Veterans of Service after 26 June 1950 (Department of Labor)	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Title IV, Veterans' Readjustment Assistance Act of 1952 (66 Stat.684)
Naturalization Benefits (Department of Justice	Eligible	Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Not Eligible	Section 329, Immigration and Nationality Act (66 Stat.250); Act of 30 June 1953 (Pub.Law 86, 83d Cong; 67 Stat.108)
Social Security (Social Security Administration)	Eligible	Eligible	Eligible*	Eligible*	Eligible*	Not Eligible	Not Eligible	Not Eligible	Section 217 Social Security Act, as added by section 105, Social Security Act Amendments of 1950 (64 Stat.512; 42 U.S.C.417), as amended (section 5, Social Security Act Amendments of 1952 (66 Stat.773); section 1, act of 14 August 1953 (67 Stat.580))

State Benefits

The states provide a varying number of veterans' benefits which include bonuses, burial rights, employment preferences and tax benefits. No general rule can be stated as to eligibility requirements for such benefits. Some states require "an honorable discharge"; others require "discharge under conditions other than dishonorable", "service with honor", or "satisfactory service".

* Subject to a review of the facts surrounding the discharge by the agency administering the benefit.

** Subsection 349(a)(3), Immigration and Nationality Act (66 Stat 268) provides in part that a person convicted by a court-martial for desertion in time of war and sentenced to a dishonorable discharge, shall as a result thereof lose his nationality.

*** Resignations for the good of the service are normally accepted as under other than honorable conditions and a discharge (under other than honorable conditions) is issued. Paragraph 4 d, Army Regulations 605-275, dated 27 June 1949, provides, however, that if the Department of the Army determines that the resignation be accepted under honorable conditions, an honorable or general discharge may be furnished. As a matter of policy if it is determined that the resignation is under honorable conditions it is no longer considered a resignation "for the good of the service" but as a resignation under honorable conditions.

**** Section 10 of the act of 5 May 1950 (64 Stat.146; 50 U.S.C. 739) provides for the dropping from the rolls of an officer absent without leave more than three months or who has been convicted by civilian authorities and sentenced to confinement in a Federal or state penitentiary or correctional institution. This office has previously stated that such separation will usually be characterized as under other than honorable conditions.

***** Section 4821, Revised Statutes (24 U.S.C.49) provides that certain soldiers with service in the Army of the United States are eligible for admission to the Soldiers' Home. Section 4822, Revised Statutes (24 U.S.C. 50) provides "the benefits of the Soldiers' Home shall not be extended to any soldier in the regular or volunteer service, convicted of felony or other disgraceful or infamous crimes of a civil nature after his admission into the service of the United States; nor shall any one who has been a deserter, mutineer or habitual drunkard be relieved without such evidence of subsequent service, good conduct, and reformation of character as is satisfactory to the commissioners".

****** Section 300 of the Servicemen's Readjustment Act of 1944 (58 Stat.286; 38 U.S.C. 693g) provides in substance that discharge or dismissal by reason of sentence of GCM and other discharges and dismissals specified, shall bar all rights based upon the period of service from which discharged or dismissed, under any laws administered by the Veterans' Administration.

[fol. 113] INCLOSURE 2 TO AFFIDAVIT

CORRECTED COPY

CHARACTER OF SEPARATION: (UNDER HONORABLE CONDITIONS) GENERAL

REPORT OF SEPARATION FROM THE ARMED FORCES OF THE UNITED STATES

DEPARTMENT: ARMY

SEPARATION DATA

1. LAST NAME – FIRST NAME – MIDDLE NAME	2. SERVICE NUMBER	3. GRADE – RATE – RANK AND DATE OF APPOINTMENT	4. COMPONENT AND BRANCH OR CLASS
[redacted], John Henry III	US51 207 184	Pvt E-2 28 Feb53	AUS TC

5. SPECIALTY NUMBER OR SYMBOL	RELATED CIVILIAN OCCUPATION AND D O T NUMBER	6. EFFECTIVE DATE OF SEPARATION: DAY	MONTH	YEAR	7. TYPE OF SEPARATION
1824	Cook 02-26.31	2	June	54	Discharge

8. REASON AND AUTHORITY FOR SEPARATION: Sec 301; PL 346

9. PLACE OF SEPARATION: Transfer Point, Camp Pickett, Virginia

10. DATE OF BIRTH: DAY	MONTH	YEAR	11. PLACE OF BIRTH (City and State)	12. DESCRIPTION: SEX	RACE	COLOR HAIR	COLOR EYES	HEIGHT	WEIGHT
17	Jul	31	Houston, Texas	Male	Negro	Black	Brown	5'9"	155

SELECTIVE SERVICE DATA

13. REGISTERED: YES	NO	SELECTIVE SERVICE NUMBER	14. SELECTIVE SERVICE LOCAL BOARD NUMBER (City, County, State)	15. INDUCTED: DAY	MONTH	YEAR
X		50 16 31 304	LB16, New York, New York	31	Oct	52

16. ENLISTED IN OR TRANSFERRED TO A RESERVE COMPONENT: YES [ ] NO [X] — COMPONENT AND BRANCH OR CLASS: Not Applicable — COGNIZANT DISTRICT OR AREA COMMAND

SERVICE DATA

17. MEANS OF ENTRY OTHER THAN BY INDUCTION: [ ] ENLISTED [ ] REENLISTED [ ] COMMISSIONED [ ] CALLED FROM INACTIVE DUTY — Not Applicable

18. GRADE, RATE OR RANK AT TIME OF ENTRY INTO ACTIVE SERVICE: pvt-1

19. DATE AND PLACE OF ENTRY INTO ACTIVE SERVICE: DAY	MONTH	YEAR	PLACE (City and State)	20. HOME ADDRESS AT TIME OF ENTRY INTO ACTIVE SERVICE (St., R F D., City, County and State)
31	Oct	52	New York, New York	Box 77, Bucknell University, Lewisburg, Pa.

STATEMENT OF SERVICE FOR PAY PURPOSES

	A. YEARS	B. MONTHS	C. DAYS
21. NET ( ) SERVICE COMPLETED FOR PAY PURPOSES EXCLUDING THIS PERIOD	Not Applicable		
22. NET SERVICE COMPLETED FOR PAY PURPOSES THIS PERIOD	1	7	2
23. OTHER SERVICE (*Act of 16 June 1942 as amended*) COMPLETED FOR PAY PURPOSES	0	0	0
24. TOTAL NET SERVICE COMPLETED FOR PAY PURPOSES	1	7	2

25. ENLISTMENT ALLOWANCE PAID OR EXTENSION OF ENLISTMENT, IF ANY: DAY / MONTH / YEAR / AMOUNT — Not Applicable

26. FOREIGN AND/OR SEA SERVICE: YEARS 0 — MONTHS 0 — DAYS 0

27. DECORATIONS, MEDALS, BADGES, COMMENDATIONS, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED: None

28. MOST SIGNIFICANT DUTY ASSIGNMENT: 56th Trans Co (Lt Trk) (Army)

29. WOUNDS RECEIVED AS A RESULT OF ACTION WITH ENEMY FORCES (Place and date, if known): None

30. SERVICE SCHOOLS OR COLLEGES, COLLEGE TRAINING COURSES AND/OR POST GRAD COURSES SUCCESSFULLY COMPLETED	DATES (From—To)	MAJOR COURSES	SERVICE TRAINING COURSES SUCCESSFULLY COMPLETED
None	None	None	All Basic Training

INSURANCE AND PAY DATA

GOVERNMENT INSURANCE INFORMATION (A) Permanent plan premium must continue to be paid when due or within 31 days thereafter or insurance will lapse. (B) Term insurance not under waiver same as (A) above. (C) Term insurance under waiver – premium payment must be resumed within 120 days after separation. Forward premiums on NSLI to Veterans Administration District Office having jurisdiction over the area shown in Item 47. Forward premiums on USGLI to Veterans Administration Washington 25 D. C. (See VA Pamphlet when paying premiums give full name, address, Service Number, Policy Number(s), Branch of Service, date of separation. Contact nearest VA office for information concerning Government Life Insurance.

32A. KIND & AMT. OF INSURANCE & MTHLY. PREMIUM	32B. ACTIVE SERVICE PRIOR TO 1 APR 1951	MONTH ALLOTMENT DISCONTINUED	33. MONTH NEXT PREMIUM DUE
None Indemnity	[ ] YES [X] NO	Not Applicable	Oct 54

35. TOTAL PAYMENT UPON SEPARATION	36. TRAVEL OR MILEAGE ALLOWANCE INCLUDED IN TOTAL PAYMENT	SHORSING OFFICER'S NAME AND SYMBOL NUMBER
Not Applicable	Not Applicable	Not Applicable

AUTHENTICATION

38. REMARKS (Continue on reverse)

Blood Group 'B'
No days lost under sec 6 (a) App 2b MCM, 1951.
Para 10, AR 615-120 applies
Prepared in SAGO 6 June 1956

SIGNATURE OF OFFICER AUTHORIZED TO SIGN: R L Richstatter

NAME, GRADE AND TITLE (Typed): R. L. RICHSTATTER, CAPT, AGC

PERSONAL DATA

40. V A BENEFITS PREVIOUSLY APPLIED FOR (Specify type) COMPENSATION, PENSION, INSURANCE, BENEFITS, ETC: None — CLAIM NUMBER: None

41. DATES OF LAST CIVILIAN EMPLOYMENT: FROM None TO None — 42. MAIN CIVILIAN OCCUPATION: None — 43. NAME AND ADDRESS OF LAST CIVILIAN EMPLOYER: Not Applicable

44. UNITED STATES CITIZEN: [X] YES [ ] NO — 45. MARITAL STATUS: Single — 46. SCHOOL YEARS COMPLETED: GRAM 8, HIGH 4, COLL 4 — DEGREE(S): BA — MAJOR(S) FIELD(S): Political Science

47. PERMANENT ADDRESS FOR MAILING PURPOSES AFTER SEPARATION (St., R F D., City, County and State): 601 E. 226th St. Bronx New York

48. SIGNATURE OF PERSON BEING SEPARATED

DD FORM 214 EDITION OF 1 JAN [illegible] — INDIVIDUAL'S COPY TO BE DELIVERED TO THE INDIVIDUAL BEING SEPARATED

ALL ENTRIES APPLY TO CURRENT PERIOD OF SERVICE (unless otherwise indicated)

Applicant: Yes, sir.

Presiding Officer: How well did you get to know them?

Applicant: I was a kitchen helper and Mrs. Wellman, she was working in the dining room.

Presiding Officer: As a waitress?

Applicant: Yes she was.

Presiding Officer: Mrs. Schotz?

Applicant: She was on the childrens side, and we all ate together and I got to know, I think I had known or got acquainted with most of the employees there.

Presiding Officer: To begin with, you knew both Mrs. Wellman and Mrs. Schotz very well?

Applicant: Yes, sir.

Presiding Officer: In other words, you saw them every day on innumerable occasions?

Applicant: Yes, sir.

Presiding Officer: Did you talk with them or just say, good morning or hello or something like that?

Applicant: I talked to them.

Presiding Officer: You talked to them at some length?

Applicant: Yes, sir.

Presiding Officer: For both years?

Applicant: For the year, I think it was, 1951, I am not certain, sir. No, I will take that back, it was the summer of 1952.

Presiding Officer: In the summer of 1952 you really got to know them pretty good?

Applicant: That is when I first met them.

Presiding Officer: You really got to know them real well?

Applicant: I don't know what their reactions were to me.

Presiding Officer: I realize you don't know what their reactions were to you, what was your reaction?

Applicant: Favorably impressed.

Presiding Officer: On what basis were you favorably impressed, Mr. Harmon?

Applicant: Well, to me, I think both of the ladies in question, they were mothers, and besides returning to their children, each one of them was working also, and I had a very high respect for their capacity and their jobs.

Presiding Officer: What did you have in common to talk about, their children, their work or what?

Applicant: Well, frankly, I should imagine working conditions and plans for the future, I was a college student and they were interested.

Presiding Officer: Did you discuss politics?

Applicant: Yes, I think we did, sir, certainly.

Presiding Officer: Did you discuss communism?

Applicant: I don't recall, sir.

Presiding Officer: You don't remember?

Applicant: No, sir.

Presiding Officer: You remember that you discussed politics, you don't remember whether you discussed communism?

Applicant: When I say that I remember that we discussed politics, I think it is very seldom that I got into a certain discussion, but eventually I would get into a discussion of politics.

Presiding Officer: In other words, you enjoyed talking about politics?

Applicant: Yes, sir.

Presiding Officer: Including the National Labor Party, I suppose?

Applicant: I am not familiar with the National Labor Party, sir.

Presiding Officer: I mean, the American Labor Party?

Applicant: Yes, sir, I did register to vote for the American Labor Party in 1952.

Presiding Officer: And, you discussed the American Labor Party aims with Mrs. Wellman and Mrs. Schotz?

Applicant: No, sir, I did not.

Presiding Officer: You didn't?

Applicant: No, sir.

Presiding Officer: Now, on the basis of knowing these two women as well as you told the board you did, when it came to your attention through the newspaper that their husbands had been indicted under the Smith Act, you thought some money should be raised for their defense, is that correct?

Applicant: Yes, sir, I thought that was the most tangible way to show any concern.

Presiding Officer: Because you knew the women?

Applicant: Yes, sir, primarily.

Presiding Officer: No other reason?

Applicant: No, sir.

Presiding Officer: You got the word that they were indicted from the newspaper?

Applicant: That is correct.

Presiding Officer: Nobody else?

Applicant: No, sir.

Presiding Officer: Or from the women themselves?

Applicant: No, sir.

Presiding Officer: From the newspaper, what were they indicted for, Mr. Harmon?

Applicant: I think they were indicted for violation of the Smith Act, sir.

Presiding Officer: Did you know what the Smith Act was?

Applicant: I think it is an act having to do with advocating violence to overthrow the United States Government.

Presiding Officer: You did know what the act was?

Applicant: Yes, sir.

Presiding Officer: You were well aware of what the act was, weren't you?

Applicant: No, I couldn't say that because I never read the act in its entirety, but through the newspapers I was familiar with the general aims and purpose.

Presiding Officer: Where did you get the idea what the Smith Act was, just from reading newspapers?

Applicant: Yes, sir, I would say so even though I was a student of Political Science at that time, no reason to study that.

Presiding Officer: In what university were you a student of Political Science?

Applicant: Bucknell University.

Presiding Officer: Now, Mr. Harmon, knowing what the Smith Act was, and knowing that these two men had been indicted by a Federal Grand Jury knowing that the Smith Act—indicted for violation of the Smith Act, which indicated a possible connection with some effort to overthrow the government, you just went out to help raise money for no other reason except that you knew the two women?

Applicant: Yes, sir. Secondly, for the fact that I strongly believe that when a person is accused of something, under our laws he is judged innocent until proven otherwise, even if an indictment is handed down against him.

Presiding Officer: That is correct. I think everybody in the United States realizes that an individual is not guilty until proven otherwise, but at the same time have you ever contributed to anybody elses defense?

Applicant: No, sir, I have not.

Presiding Officer: The sole reason for your endeavoring to raise funds was, in spite of the fact that you knew what the Smith Act was, and these two men were indicted under that Act, your sole reason for raising funds was because you knew their wives?

Applicant: Yes, sir, that was my sole reason.

Presiding Officer: Nobody approached you to do it?

Applicant: No, sir.

Presiding Officer: How much money did you raise?

Applicant: I don't recall that I raised any, sir. I suggested to Roy Meador who was a chef when I was at Camp Lakeland in 1952, and to Ray Staleman who was a waiter in the dining room, that perhaps something ought to be done to help the people out; to help Gertrude and Peggy

out, and the only way—I could see no way of offering any help except through financial support, even though limited, and I asked for no specific contribution and set no limit on the contribution.

Presiding Officer: What did you do in connection with soliciting funds?

Applicant: My soliciting was confined to correspondence, sir.

Presiding Officer: With just two people?

Applicant: That's right.

Presiding Officer: Those were the only two?

Applicant: Yes, sir.

Presiding Officer: You got no money?

Applicant: I don't know, sir, I didn't send in any money for them, I suggested that if they felt that something should be done to help these people that they would go ahead and send in a financial contribution.

Presiding Officer: In 1949, were you employed by the Detroit Urban League?

Applicant: Yes, sir, I was.

Presiding Officer: In what capacity?

Applicant: I was employed as a camp counselor, sir.

Presiding Officer: In the capacity as camp counselor, what did you do?

Applicant: I had a cabin of thirteen children ranging in age from eight or nine to fourteen years old, and it was my responsibility to them to provide recreation outlets for them and otherwise to follow the program set down by the camp director.

Presiding Officer: You have told me that you did register to vote for the American Labor Party in New York City, did you not?

Applicant: Yes, sir.

Presiding Officer: What year was that?

Applicant: This was in 1952, sir.

Presiding Officer: Did you solicit any funds for the defense of Mr. and Mrs. Rosenberg?

Applicant: No, sir.

Presiding Officer: Did you at any time make any remarks to anybody either verbally or in writing relative to the Rosenberg case?

Applicant: I don't recall, sir.

Presiding Officer: Were you approached by anybody in connection with the case to help in any way, shape or form?

Applicant: I can't say that I was, sir.

Presiding Officer: You say you were introduced to Mr. Sol Vail who was the manager of Camp Lakeland by your father?

Applicant: Yes, sir.

Presiding Officer: Was your father a member of the Communist Party?

Applicant: Sir, I could not say, I don't know my father's politics.

Presiding Officer: You don't?

Applicant: No, sir.

Presiding Officer: Was your father a member of any communist front organization?

Applicant: Frankly, sir, I couldn't say and be honest as to what organizations my father belonged to or not. I respect him as my father, and we have talked and I have never asked him about his political leanings one way or the other because he is my father, and I am loyal to him, I just don't want to say.

Presiding Officer: Is your father a member of the International Workers Order?

Applicant: I don't know, sir.

Presiding Officer: How did your father become acquainted with Mr. Vail?

Counsel: Excuse me, sir, I don't intend to interrupt the questioning, but I would like to get this in the record, if I may. Mr. Harmon has told me that the only thing about this proceeding which disturbs him, and it disturbs him because of his affection and feeling for his father, was the fact that he had been in a position where he would have to answer questions concerning his father and stepmother,

whom he loved very, very, much. I told him very simply that if you don't know about any specific matters, say you don't know, but if it is a question where you do know and you have an exception to making an answer to the question, state what your exception is to not making the answer. I would like my client to feel that way, and I would like the board to understand I feel that way. In this country, somehow in my mind, we always talk about our parents, but in the Soviet Union they talk about their fathers and their mothers, and I think perhaps that is what Mr. Harmon is a little bit concerned about.

Presiding Officer: Have you finished?

Counsel: Yes, sir.

Presiding Officer: Have you ever been a member of the International Workers Order?

Applicant: You ask me if I was a member?

Presiding Officer: Yes?

Applicant: No, sir.

Presiding Officer: Were you ever associated with persons who were communists?

Applicant: It is quite possible that I have, sir.

Presiding Officer: You say you don't know, is that it, or is it possible, yes or no, or don't you know?

Applicant: I would say that I don't know.

Presiding Officer: You don't know?

Applicant: That's right.

Presiding Officer: Were you ever associated with people who were members of a communist front organization?

Applicant: Again I would have to say, I don't know, sir.

Member: Mr. Harmon, did I understand you correctly when speaking of soliciting of these funds, that the soliciting of these funds was through correspondence?

Applicant: Yes, ma'am.

Member: In what way? What did you do?

Applicant: I wrote to Roy Meader and Ray Staleman and mentioned the fact that I had seen where Peggy Well-

man's husband and Gertrude Schotz's husband were indicted under the violation of the Smith Act, and having known them, the two women, and respected them, I suggest that perhaps by business connection, had the facilities there in the camp, we might express our friendship toward them by some type of financial contribution.

Member: I was under the impression those two people were at Camp Lakeland with you, I didn't know you had to write to them?

Applicant: You see, I wrote to them, I think it was after I was inducted, yes, ma'am.

Member: After that, but not at the time you were there?

Applicant: No, sir.

Member: Were they the only ones you wrote to?

Applicant: Yes, ma'am, that's right.

Presiding Officer: How much money did you personally contribute to the fund of Mr. Wellman and the other man?

Applicant: I believe it was two or three dollars, sir.

Presiding Officer: Only two or three dollars?

Applicant: Yes, sir.

Member: In this letter that you wrote to Mr. Meador, where did you say the money was to be sent?

Applicant: I think I suggested that it be sent to Mr. Vail's Office. Sol Vail was the manager of the camp, and he could forward it on to Peggy Wellman and Gertrude Schotz because he hired them.

Presiding Officer: How did you happen to decide to have it sent to Mr. Vail, maybe he wasn't interested in the matter?

Applicant: That is quite possible, sir. If a letter was sent to him with a notation that it be forwarded, I was sure that he would have done it.

Presiding Office: That is all the questions by the members of the Board, Mr. Shapiro, have you anything further to offer?

Counsel: I would like to ask a couple other questions of Mr. Harmon, if I might be permitted to do so. Mr. Harmon,

I think Colonel Crane asked you whether or not, perhaps I better paraphrase this to ge the point, perhaps your sole and exclusive reason for becoming interested in the defense of the husbands of these two women you had been very well acquain.ed with at Camp Lakeland was the fact of your friendship. Now, isn't it also true that it is part or parcel of that reason you had some pretty serious opinions as to the validity or constitutionality of the Smith Act prosecutions?

Applicant: Yes, sir, that is quite true. I have personally contended that the Smith Act was, I would say, unconstitutional and I think I have found support by jurors, and I think when the Smith Act was brought before the Supreme Court there were dissenting opinions handed down.

Counsel: Mr. Harmon, let me ask you this question, you contended this, where did you contend this, under what circumstances?

Applicant: I think at home even, I discussed it with my father, had a discussion with my father on the Smith Act, this is unconstitutional.

Counsel: Why do you think it is unconstitutional, Mr. Harmon?

Applicant: I feel that because in a democracy we can have all types of varying opinions, and a democracy group should be strong enough to stand even dissension. We have laws on overt acts, and an expression of constitutionality where people can be judged with critical opposition.

Counsel: If I understand you, Mr. Harmon, you felt the Smith Act was unconstitutional instead of a punishing act or attempts to commit acts, it was actually a punishing proposition, is that correct?

Applicant: Yes, sir, I think that is true.

Counsel: And, that was the reason you felt that the convictions were wrong?

Applicant: Surely.

Counsel: Do you think that this attitude of yours was entirely or part of the consideration on your part for you

to come to the assistance of the husbands of these women aside from the question of friendship?

Applicant: Yes, sir, because here if I disagree with the constitutionality of the Smith Act—here was a concrete example where I could express my disagreement legally and constitutionally because it is an inherent prerogative, a person has a right to defend.

Counsel: Do you know of any law, regulation, or statute which prohibits or restricts any individual from attempting to solicit funds or sums of money for individuals accused of any kinds of a crime no matter how heinous?

Applicant: No, I don't.

Counsel: Mr. Harmon, do you have anything further to offer?

Applicant: No, I haven't.

Presiding Officer: Any questions by the members of the Board?

Members: (No questions).

Counsel: Mr. Harmon, when you were at Indiantown Gap, say the night before you were awakened by the gentlemen from the CIC, had you any idea that anything was going to happen by reason of your thoughts, attitude, or association or activity of any kind?

Applicant: I had none whatsoever. I might explain, I don't know if I have before, but I was asked, oh, I think in January or February of 1953, just before I finished basic training if I would like to put in an application for training as a Public Information Specialist in the Army, and I hopped to the idea, and on the application blank I had to fill out, I had to put down the past five years employment and give character references, I did so without a second thought and then I was visited by these gentlemen.

Counsel: It came like a bolt out of the blue?

Applicant: Very definitely, sir.

Counsel: What time of the night was it that you were awakened?

Applicant: Between ten and twelve o'clock, I was scheduled to go to work cooking at one o'clock.

Presiding Officer: Mr. Shapiro, your question was what time of the night it was?

Counsel: He tells me that it was in the day time.

Presiding Officer: That is what is not clear in my mind, counsel, just what time of the night—what was the answer?

Counsel: Close to noon. Were you sleeping at the time, Mr. Harmon?

Applicant: Yes, sir, my Commanding Officer awakened me and I thought he was getting me up to go to work. I got up and started to put my clothes on, and these gentlemen walked in and the Sergeant stood in the door, and they stuck me against the wall beating me down, I didn't know what to think.

Counsel: Mr. Harmon, were you afraid?

Applicant: I was very apprehensive, yes, it is the same as when a policeman stops you on the road, oh, oh, done something wrong, and these gentlemen presented badges.

Counsel: Where were you taken by these gentlemen after they searched you?

Applicant: I was taken to G-2 Headquarters.

Counsel: Were you taken into any sort of a room or building?

Applicant: I was taken into a room with no ventilation, fan going I believe, and there was a couple table lamps on, and I don't know whether there was a stenographer over there, but Mr. Smith, who was head of the intelligence outfit was there and about four or five other men with him, civilian folks, and a Lieutenant who, I guess, was in charge of G-2 operations there.

Counsel: You say the questions came at you pretty fast?

Applicant: Yes, sir, they did.

Counsel: Do you think if you had an opportunity to have carefully considered the questions and your answers to the questions, if you had done so in a calm and deliberate atmosphere rather than through fear, do you believe you would have answered as you did on the investigation report?

Applicant: I think if I had time to I would have given more or less similar responses that I had given in the file with the AGO.

Counsel: Weren't you also a little bit probably resentful?

Applicant: Yes, I was here where these gentlemen were impuning my loyalty, you are suspected of having had subversive associations, I believe that is what the gentlemen said, and then we got down to G-2 and one of the gentlemen said, how long have you been a courier for Soviet Union. Gee whiz. . . .

Counsel: As a matter of fact, you were rather angry?

Applicant: Yes, I was very much so.

Counsel: In a sense when you felt your loyalty was impuned, you said, in effect, as I understand it, I am just not going to cooperate, isn't that, in effect, just what you did do?

Applicant: I don't think so.

Counsel: Well, let's take it all together then, the feeling of resentment, your own fear, and because you felt you were unprepared, as I understand, led you to answer the questions in the manner and in the way you did?

Applicant: Yes, it did.

Presiding Officer: Mr. Harmon, in connection with the contributions for the defense of Mr. Wellman and the other man, you knew that there was no wrong in contributing and you so answered your attorney, is that right?

Applicant: Yes, sir.

Presiding Officer: Have you ever tried to collect funds in defense of anybody else?

Applicant: No, sir, I have not.

Presiding Officer: Mr. Harmon, your counsel, Mr. Shapiro, has asked you if you were angry because your loyalty had been impuned, is that correct?

Applicant: Yes, sir.

Presiding Officer: Your answer was what?

Applicant: I was angry.

Presiding Officer: You were angry?

Applicant: Yes, sir.

Presiding Officer: So, you decided not to cooperate, I believe?

Applicant: Surely, sir, I was unconsciously responding

Presiding Officer: Natural reaction?

Applicant: Yes, sir.

Presiding Officer: Your natural reaction, when your loyalty was impuned, is not to cooperate and apparently you denied any allegations, is that right? Instead of denying allegations of disloyalty, you just did not cooperate, is that what you are telling me?

Applicant: No, sir, I am not saying that, I don't believe that I am, I feel that if someone questions my loyalty I can explain my stand and my beliefs in the principles of my country.

Presiding Officer: Why didn't you explain?

Applicant: I didn't believe then, sir, that I was given a fair opportunity to do so.

Presiding Officer: Your defense for not explaining is that you were not given a fair opportunity, is that it?

Applicant: Yes, sir.

Presiding Officer: Any other questions by the members of the Board?

Members: (No questions).

Presiding Officer: Does counsel have anything further to offer?

Counsel: The question of resentment, was that a sole consideration or merely part of the basic reason for your answering the way you did?

Applicant: Well, I think I tried to bring out before, for one thing I was apprehensive with regard to all this interrogation, secondly, I was resentful, certainly, and in the third place I had no one with whom to seek advice, and they had seven or eight men arrayed against me, and I didn't feel capable of giving them the most correct answers.

Counsel: As I understand it then, your resentment was only part of the consideration for your answering the questions in the manner and the way you did?

Applicant: Yes, sir.

Presiding Officer: Mr. Harmon, when these gentlemen questioned you, were you advised of your rights to have counsel?

Applicant: No, sir, I was not at first. I was later informed after the interrogation had begun that I said that I would like to have counsel, and this Mr. Smith, who I again took to be the head of CIC delegation, he said, yes, Mr. Harmon, you can have counsel, but it would have to be approved by the Army, I don't know if these are his exact words or not.

Presiding Officer: Was the questioning stopped?

Applicant: No, sir, the questioning continued.

Presiding Officer: What were you apprehensive of?

Applicant: Well, sir, when someone walks in with a group of men, walks into the room where you had just been awakened, as I explained, by my Commanding Officer . . .

Presiding Officer: Was your Commanding Officer present?

Applicant: Yes, sir, I don't know how many gentlemen from the CID and a Lieutenant from G-2, a Sergeant with a .45 pistol strapped to his hip, and why someone should come into my room with weapons, I couldn't understand, I was apprehensive.

Presiding Officer: You were apprehensive for fear they would shoot you?

Applicant: I can't explain my subconscious reaction at the time.

Presiding Officer: You were just apprehensive?

Applicant: That is correct, sir.

Presiding Officer: Please proceed, Mr. Shapiro?

Counsel: I have nothing further, I just have one short closing statement.

Presiding Officer: Will you proceed with your closing statement?

Counsel: I think we have established one thing here gentlemen and that is this. Mr. Harmon, while he was in

the Army committed no unlawful act or committed any violation of any Army Regulation. Before he was in the service and prior to his induction he committed no unlawful act or committed no crime. He has political opinions and I don't agree with them and many other people don't agree with them, but in this country, as I understand it, you don't have to agree with a persons political opinions.

Now, what happens when a man gets an undesirable discharge. The Army itself has recognized under SR-600-220-1 when it provides a form for the individual who accepts an undesirable discharge; that the individual who gets one is going to be very seriously handicapped, not only in the fact that he is going to be denied very, very, substantial benefits and rights, but also in addition he is going to live with it the rest of his life with the stain or badge of dishonor of being undesirable to the Armed Forces of the United States.

Mr. Harmon has always wanted to be a lawyer. I am a member of the bar of the State of New York and Mr. Harmon will never become a lawyer under the bar of the State of New York or any other State. I feel as if this board should grant him an honorable discharge. Today, if he went before any character committee of the bar association of the City of New York or State of New York, and from my own experience I will submit to this board he will never get past that committee merely because of the fact that charges were brought against him. The fact is that charges were brought against him and no matter what the result, that is enough to keep you out. It is pretty hard to disbar somebody once he is in and once he gets by that committee and is appointed to the bar.

There are other things that Mr. Harmon would like to do, he might want to teach or he might want to go into public service, or he might, for example, want to do welfare work or wants to study to pursue some course of endeavor, and now because he has this undesirable discharge from the Army of the United States, and in every single walk of life this badge of dishonor is going to follow him

and for what, for not a single wrong act that the man committed.

His service record indicates that the only known comments about his character and about his efficiency were marked excellent, nothing else, and I respectfully submit that if Mr. Harmon had enlisted in the service or if he was an officer, which certainly is a privilege to be a member of the Armed Forces as an enlisted man or as an officer, this board here or the Secretary of the Army, or the Government could throw him out of the Army at any time under any conditions it wanted to, but something happened here that was a lot more serious, Mr. Harmon was inducted into the Army and because he was inducted he would have gone to jail if he didn't serve, and he was told, Mr. Harmon, you have got to serve your country, and he was brought in and was inducted into the Armed Forces, and it was no privilege, it was an obligation and I believe he tried to fulfil this obligation to the best of his ability for a man to be inducted into the Armed Forces, and then because he has been unpopular in his associations with people and having political opinions to be thrown out of the Army before his time of service was up, and being barred for the rest of his life because of no unlawful act, but because of political opinions, then I respectfully submit that we have come a long way.

I am going to say this because I frankly feel more than anything else, the question here is a question of responsibility to all the members of the Board, and I say that in all seriousness and whatever I say to you gentlemen is of concern or interest to this nation, or you wouldn't be where you are now. I know that you are very much concerned and I submit to you gentlemen that in the battles for this country as we know it, is a democracy for the greatest nation in the world, a nation that holds out to the entire world because we believe in it, and because we believe in freedom, equality, justice, and we battled for that and for the things which make our country the greatest thing in the world. We went and fought on Bataan and Corregidor and fought to the end of the war for this country.

I think it is a question of this man having committed no wrong, no unlawful act whatsoever, and I believe that this board must grant him in all conscience and in all decency the kind of discharge he was entitled to by reason of the quality and character of his service to his country. His service as marked on the service record was excellent and he deserves nothing less than an honorable discharge. Thank you, sir.

Presiding Officer: Does the applicant, Mr. Harmon, have anything further to offer?

Applicant: Nothing further, sir, except to say that I feel that within the limit of the regulation, this Board has accorded me all fairness at its disposal.

Presiding Officer: Anything further from counsel, Mr. Shapiro?

Counsel: No, sir.

Presiding Officer: Anything further from associate counsel, Mr. Heller?

Associate Counsel: No, sir.

Presiding Officer: Anything further from applicant, Mr. Harmon?

Applicant: No, sir.

Presiding Officer: Are there any further questions from any member of the Board?

Members: (No questions).

Presiding Officer: If there is nothing further from applicant, Mr. Harmon, counsel, Mr. Shapiro, associate counsel, Mr. Heller, and nothing further from any member of the Board, the Board will be closed.

(This concludes the testimony taken on 22 October 1954)

Reviewed by:

EDWIN F. MOODY
Lt. Col., Artillery
Board Member
Army Discharge Review Board
Date: 1 Nov. 1954

Defendant's Exhibit 2

Filed in Open Court, November 28, 1955

HEADQUARTERS 5TH INFANTRY DIVISION

Indiantown Gap, Military Reservation,
Indiantown Gap, Pennsylvania

I have been advised of my rights under Article 31, Uniform Code of Military Justice by 1st Lt. Howard J. Neff and

(a). I understand that I cannot be compelled to answer any question or questions that may tend to incriminate me;

(b) I acknowledge that I was informed of the nature of the accusation or offense concerning which I am about to be questioned; and I have been advised and I understand that I do not have to make any statement regarding the offense of which I am accused or suspected.

(c) I further understand that anything I may say or write can be used against me if I should be tried by court-martial; and

(d) I further understand that I may not be compelled to make any statement or to produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade me.

Question:-Are you now or have you ever been a member of the Communist Party, USA?

Harmon: No, I am not nor have I ever been a member of the Communist Party, USA.

Question: Are you now or have you ever been a member of any Communist organizations?

Harmon: I refuse to answer that question under Article 31, on the grounds of possible self-incrimination.

Question: Are you now or have you ever been a member of any organization, association, movement, group or combination of persons which advocates the overthrow of our Constitutional form of Government?

Harmon: I refuse to answer that question under Article 31, on the ground of possible self-incrimination.

Question: Are you now or have you ever been a member

of an organization, association, movement, group or combination of persons which has adopted the policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the constitution of the United States?

Harmon: I refuse to answer that question under Article 31, on the grounds of possible self-incrimination.

Question: Are you now or have you ever been a member of any organization, association, movement, group or combination of persons which seeks to alter the form of government of the United States by unconstitutional means?

Harmon: I refuse to answer that question under Article 31, on the grounds of possible self-incrimination.

Question: Are you or have you ever knowingly and willingly been a member of any organization, association, movement, group or combination of persons which to your knowledge has engaged in subversive activity of any nature?

Harmon: To the best of my knowledge I have not.

Question: Have you ever given financial support to any Communist organization?

Harmon: I refuse to answer that question under Article 31, on the grounds of possible self-incrimination.

Question: Do you knowingly and willingly support the platform of the Communist Party?

Harmon: I refuse to answer that question under Article 31, on the grounds of possible self-incrimination.

Question: Are you a member of any Communist cell or unit?

Harmon: No, I am not.

Question: Have you at any time solicited funds for the Communist Party?

Harmon: No, I have not.

Question: Have you at any time solicited funds for any Communist cause?

Harmon: To the best of my knowledge I have not.

Question: Have you at any time solicited funds for any organization which advocates the violent overthrow of the United States Government?

Harmon: To the best of my knowledge I have not.

Question: Have you at any time solicited funds to assist any person known by you to be a Communist?

Harmon: I refuse to answer that question under Article 31, on the grounds of possible self-incrimination.

Question: Do you make reports of any nature to any Communist organization?

Harmon: To the best of my knowledge, I do not.

Question: Would you, in defense of the United States of America, bear arms against and fight against any Communist dominated enemy in time of national emergency?

Harmon: If drafted by the armed service of the United States, I would.

Question: Have you ever at any time taken any pledge of allegiance to the aims and policies of the Soviet Union?

Harmon: To the best of my knowledge, I have not.

Question: Have you ever in any manner pledged yourself to defend the Soviet Union?

Harmon: To the best of my knowledge I have not.

Question: Do you have any statement you would like to make Pvt. Harmon?

Harmon: Not until such time as any charges have been brought against me or I have been brought before an Army Courts Martial, I have no statement to make.

Question: Do you know a person by the name of Martin Silverman?

Harmon: Yes, I do.

Question: Where did you first meet Martin Silverman?

Harmon: I first met Martin Silverman, to the best of my knowledge, at Camp Lakeland, where I was employed in the Summer season of 1952.

Question: Where does Martin Silverman live?

Harmon: To the best of my knowledge Martin Silverman lives at 634 Franklin Place, Philadelphia, Pennsylvania.

Question: To what extent have you associated with Martin Silverman?

Harmon: Only to the extent that I met him and his wife in the camp mentioned and I have visted them on

several occasions only on social visits. Our friendship had not reached very intimate proportions.

Question: Who is Martin Silverman's wife?

Harmon: To the best of my knowledge Martin Silverman's wife is Mrs. Alice Silverman.

Question: Do you know Ben Feldman?

Harmon: Yes, I do.

Question: Where and when did you have occasion to meet Ben Feldman?

Harmon: To the best of my knowledge I first met Ben Feldman at Camp Lakeland where I was employed during the Summer season of 1951.

Question: Where does Ben Feldman reside?

Harmon: To the best of my knowledge I do not know, only that I believe he resides in New York City, other than that I do not know.

Question: Who is Ben Feldman's wife?

Harmon: To the best of my knowledge Ben Feldman's wife is Edna Feldman.

Question: What is the extent of your association with Ben and Edna Feldman?

Harmon: We were friends, not of an intimate nature, whose acquaintance I had made only at the times mentioned and whom I have had occasion to see in New York once or twice, I believe.

Question: Who is Peggy Wellman?

Harmon: Peggy Wellman is a lady whom I met at Camp Lakeland in the Summer season of 1952. She was head waitress there, I believe.

Question: Do you have reason to believe that Peggy Wellman's husband was arrested for violation of the Smith act?

Harmon: I have reason to believe, to the best of my knowledge, that such was the cause of his arrest as gathered from the newspapers.

Question: Who is Peggy Wellman's husband?

Harmon: To the best of my knowledge, I do not recall Peggy Wellman's husband's name.

Question: When and where did you first meet Peggy Wellman's husband?

Harmon: To the best of my knowledge I have never met Peggy Wellman's husband.

Question: Where does Peggy Wellman reside?

Harmon: To the best of my knowledge Peggy Wellman resides in Detroit, Michigan.

Question: Who is Gertrude Schatz?

Harmon: Gertrude Schatz was a lady whom I met at Camp Lakeland in the Summer season of 1952.

Question: Was Gertrude Schatz employed at Camp Lakeland in 1952?

Harmon: To the best of my knowledge she was employed at Camp Kinderland which is adjacent to Camp Lakeland.

Question: Where does Gertrude Schatz live?

Harmon: To the best of my knowledge Gertrude Schatz lived in Detroit, Michigan.

Question: Who is Gertrude Schatz' husband?

Harmon: To the best of my knowledge I do not recall Gertrude Schatz' husband's name.

Question: Where did you first meet the husband of Gertrude Schatz?

Harmon: To the best of my knowledge I have never met the husband of Gertrude Schatz?

Question: Do you have any reason to believe that the husband of Gertrude Schatz was arrested for a violation of the Smith Act?

Harmon: To the best of my knowledge such was the cause of his arrest as gathered from reports in the newspapers about same.

Question: Have you ever solicited funds in behalf of and in order to assist the husbands of Peggy Wellman and Gertrude Schatz?

Harmon: To the best of my knowledge I have suggested that something be done to assist Peggy Wellman and Gertrude Schatz who, being the wives respectively, the husbands' first names I do not know, it may be considered that

I have in some manner solicited funds for the assistance of their husbands.

Question: From whom have you solicited funds in order to assist the husbands of Peggy Wellman and Gertrude Schatz?

Harmon: I have not, or to the best of my knowledge I have not, solicited funds from anyone. My own efforts in behalf of Peggy Wellman and Gertrude Schatz were to suggest to Roy Meador and Roy Stollerman that perhaps something should be done to aid Peggy Wellman and Gertrude Schatz.

Question: Did you ever at any time set a quota in dollars as a possible goal to be reached in seeking aid for the Wellmans' and Schatz'?

Harmon: At this time I do not recall.

Question: Is it possible that you set a dollar goal in your efforts to assist the Wellmans' and Schatz'?

Harmon: It is possible that I may have set a goal in dollars and cents in my suggestion for aid to Peggy Wellman and Gertrude Schatz.

Question: To whom or to what office were the contributions to be sent in the drive to assist the Wellmans and the Schatz'?

Harmon: There was no designation as to whom or to what office aid might be sent to assist Peggy Wellman and Gertrude Schatz; insofar as I was chairman of the Lakeland Staff organization in the Summer season of 1952 and insofar as Sol Vail was Director of Camp Lakeland in that same season, it is possible that persons to whom such suggestions may have been made might have considered myself or Sol Vail, at his Camp Lakeland Office in New York City, to be the persons to whom aid might be sent.

Question: By aid, do you mean monetary contributions?

Harmon: Specifically monetary contributions.

Question: Who is Rachael Johnstone?

Harmon: To the best of my knowledge I do not know this person Rachael Johnstone.

Question: Do you have knowledge to the effect that your father, John Henry Harmon, Jr., is a Communist?

Harmon: To the best of my knowledge I have no such ideas concerning Communist implications on the part of my father, John Henry Harmon, Jr.

Question: Is your father, John Henry Harmon, Jr., a member of any Communist organizations?

Harmon: To the best of my knowledge, I do not know.

Question: At this time would you bear arms against any country who may have caused the United States to be attacked and which is Communist influenced?

Harmon: Although your question is vague, I think I understand it. If so ordered by my superior officer or officers, I would.

Question: Would you follow the orders of your superior officers for patriotic reasons or merely to prevent disciplinary action against you.

Harmon: I consider the question vague and would only say that it would have to be more specific.

Question: In time of National emergency, would you in defense of the United States of America fight against a Communist dominated enemy or a Communist influenced enemy because of patriotic motives or merely to prevent yourself from becoming a subject of disciplinary action?

Harmon: I refuse to answer that question.

Question: Why?

Harmon: Under Article 31, on the grounds of possible self incrimination with the added statement that I consider patriotism to be inherent in a man's personality until such time as that patriotism is shown to be false.

Question: Where is Camp Lakeland?

Harmon: To the best of my knowledge Camp Lakeland is located about twelve or thirteen miles from the city of Poughkeepsie, New York. The Postal address to such camp being Hopewell Junction, New York.

Question: Are Communist teachings propagated at Camp Lakeland?

Harmon: I refuse to answer that question under Article 31, on the ground of possible self-incrimination.

Question: What party, association, group or combination of persons sponsor Camp Lakeland?

Harmon: To the best of my knowledge I do not know.

No threat, coercion, or promises, or unlawful influence or inducement has been made to me and with full knowledge of my rights concerning self-incrimination, I voluntarily make the above statement.

To show that I know and understand the foregoing I place my signature here:

The foregoing statement is true and correct to the best of my knowledge.

JOHN HENRY HARMON, III
John Henry Harmon, III
Pvt.-2 US 51207184
Co. D, 11th Inf. Reg.
5th Inf. Div.

Subscribed and sworn to before me at Indiantown Gay Military Reservation, Pennsylvania, this 7th day of May, 1953.

HOWARD J. NEFF
Howard J. Neff
1st Lt. Hq. 5th Inf. Div.
Auth. to act as Notary
Art. 136, UCMJ, 1951

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202 Filed November 29, 1955

Amendment to Answer

Pursuant to leave granted by order of this Court on November 28, 1955, defendant herein files the following amendments in substitution for paragraphs 10 and 17 of his answer:

10. Defendant denies the allegations of paragraph 10 of the complaint, and alleges that plaintiff's discharge certifi-

cate recited that the authority for his discharge was AR 615-370, but that in fact plaintff was discharged under the authority of Department of Defense Directive 5210.9 dated April 7, 1954.

17. Defendant denies the allegations of paragraph 17 of the complaint except that he admits that plaintiff's service record was marked "excellent" as to character and efficiency only for the periods November 12, 1952 to July 24, 1953; and August 2, 1953 to 24 April, 1954; but that for the balance of plaintiff's military career his service record was marked "unknown" as to character and efficiency.

/s/ WARREN E. BURGER
Assistant Attorney General

/s/ EDWARD H. HICKEY
/s/ DONALD B. MACGUINEAS
/s/ HOWARD E. SHAPIRO
Department of Justice
Attorneys for Defendant.

Let this be filed:
LUTHER W. YOUNGDAHL

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203 Filed January 24, 1956

Memorandum

This cause came on to be heard on cross-motions for summary judgment.

Plaintiff was inducted into the Army on October 31, 1952, under the Universal Military Training Law of 1948. On February 9, 1954, he was ordered to reply to certain derogatory information which the Army had received about him. On March 11, 1954, plaintiff replied to questions concerning allegedly subversive activities in which he was involved in 1949, 1951, and 1952, such as employment at Camp Lakeland, with the Detroit Urban League, registering to vote with the American Labor Party in New York, and solicit-

ing funds for defense of persons indicted under the Smith Act. Plaintiff's father and stepmother were alleged to be subversive.

Save for plaintiff's continuing association with his parents and for writing one letter requesting contribution for the legal defense of two persons indicted under the Smith Act, all charges against plaintiff were based on conduct antedating his induction into the Army.

On the basis of these facts the Army informed plaintiff,
on April 2, 1954, that although he would be retained
204 in the Army, he would not be promoted; that he
would not be discharged as disloyal or subversive, but he would be assigned to non-sensitive duties; and that upon completion of his term of service, he would be given a discharge relative to the type of service rendered as of the date he became eligible for separation.

On April 7, 1954, the Secretary of Defense issued a Department of Defense Directive, number 5210.9, which modified existing regulations of the Armed Services so as to make the civilian security program for government employees apply to the military. Cases previously cleared were ordered reviewed and on May 26, 1954, the Adjutant General informed plaintiff's Commanding Officer that he would be discharged with an Undesirable Discharge under the provisions of Army Regulation No. 615-370, although the discharge now appears to have been made under 5210.9, i.e., that retention of plaintiff was inconsistent with the interests of national security. On June 2, 1954, plaintiff was discharged from the Army.

Plaintiff then applied unsuccessfully to the Army Discharge Review Board and the Army Board for the Correction of Military Records to have the character of his discharge changed from Undesirable on the ground that his services both as to character and efficiency had been rated as excellent throughout his entire army life. After plaintiff requested the Secretary of the Army to award him an

honorable discharge, his case was reopened by the Army Board for Correction of Military Records but relief was denied.

In his complaint, plaintiff states that he is not now and never has been a member of the Communist Party or any of its front organizations, or of any organization which has engaged in subversive activities of any kind. Plaintiff asserts that he has always been "unswervingly loyal to the Government of the United States." To this the government responds that for lack of knowledge and information sufficient to form a belief, it denies plaintiff's assertion, but in its argument it concedes that it has never found plaintiff either disloyal or loyal. Since the position of the government is that plaintiff was dismissed under Directive 5210.9 which requires no finding of disloyalty, it maintains that assertions of loyalty are not material to the legal issues raised by the motions for summary judgment.

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The Government concedes that during the entire period of plaintiff's military service he received an excellent rating both as to character and efficiency.

The authority to prescribe conditions under which a soldier shall be discharged from service has been vested by the Congress in the Secretary of the Army. 10 U.S.C. 652a (1950). Since the statute does not specify the categories of discharges to be issued, the Secretary has authorized a series of Army Regulations establishing five categories and describing the circumstances under which they shall be given. An Undesirable Discharge is issued to persons separated by administrative action from the Army because they are found to threaten the Army's discipline, or morale, or function as a national defense arm. Plaintiff was issued such a discharge as a security risk.

Understandably the establishment of standards and the administration of these standards have been considered as peculiarly military. It must be so for the military does

constitute a specialized community, of necessity governed by a discipline uniquely adapted to its own needs. 206. Respecting this the courts have been scrupulously careful not to interfere with, or intervene in, authorized and legitimate army matters. The statute authorizing military determination of discharge certificate has been construed to restrict judicial review.[1] Chief Judge Edgerton noted in *Gentila* v. *Pace*, 90 U.S. App. D.C. 75, 77, (D.C. Cir. 1951):

> "We think Congress intended that the Board's full and 'final' review should not be subjected to further review, or series of reviews, in the courts. We may suppose that Congress considered the heavy burden that would be imposed upon courts if they were required to review the findings upon which Army discharges are based. * * * At the very least, we think the statute intends that merely erroneous findings of fact by the Discharge Review Board shall not be revised by a court."

Although it may be true that the immediate case presents questions of law, it likewise involves a review of the findings upon which the separation was based, for while the vast majority of facts upon which the government relies occurred prior to induction, at least one such fact occurred during the term of military service. We feel constrained to hold, therefore, that under the present state of the law we lack requisite authority to review, control or compel the granting of particular types of discharge certificates.

We would, nevertheless, be remiss if we failed to point out the inequities which may result, as in this case, from the lack of adequate Congressional circumscription of military action regarding discharges—action which is isolated from judicial review.

The established policy of the military has been that the character of a discharge certificate is rooted in, and

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[1] See Marshall v. Wyman, 132 F. Supp. 169 (1955), Davis v. Woodring, 72 App. D.C. 83 (1940).

207 fashioned from, the conduct of a man during his term of service. In 1954, former Secretary of the Army Stevens stated:

> "The traditional policy of the Army has been that the discharge given should reflect the service rendered. In other words, a man whose conduct has been faithful and honest during the time in service would be entitled to separation under honorable conditions, notwithstanding what his conduct may have been prior to entering the service." (Hearings, Senate Armed Services Committees on S. 3096, 83d Cong., 2d Sess., March 18, 1954, at p. 75).[2]

Support for the proposition that a discharge certificate was intended to be an unlimited military appraisal of the lifelong conduct of an individual rather than a reflection of the quality of service rendered does not readily appear.

While the discharge certificate is issued by the military, it has tangible and practical consequences in civilian life. To an honorable discharge accrue property rights, civil rights, and community respect and honor. *United States* v. *Keating, et al.*, 121 F. Supp. 477 (D.C. Ill. 1949). Conversely, one receiving an adverse discharge certificate must expect to encounte substantial prejudice in civilian life. See, for example, form letter issued by the Army under SR 600-220-1 effective June 18, 1954. Congress has been informed that discharges are made on the basis of actual military service rendered and not on matters extraneous to such service.[3] If, in practice, this is not the case,
208 Congress should be so informed.

At the same time, if we have too narrowly construed the scope of judicial review under the present statute,

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[2] See also 13 Op. Atty. Gen. (1869), 18 Op. Atty. Gen. 427 (1886), and Army Regulation No. 615-360.

[3] Former Secretary of the Army Stevens testified before the Senate Armed Services Committee on March 18, 1954, that:

> "When evidence fails to show that he is disloyal, or otherwise subversive, but does establish that he is otherwise a security risk and should be eliminated, he is separated honorable conditions, usually with a general discharge."

it might be well to have a more definitive judicial determination as to the status of military service, the nature and import of a discharge certificate, and the scope of judicial review.[4] The Supreme Court has recently held that a soldier, once discharged, cannot be tried by the military for a crime alleged to have been committed while he was in the service.[5] We assume without question that the military cannot try a man for alleged criminal conduct committed prior to his entry into service. Does it not equally offend our traditional concept of justice that a man who serves the military with a rating of excellent can be dismissed by it, without being found disloyal, for non-criminal conduct which occurred primarily, if not exclusively, prior to induction, and can be furnished a discharge certificate which, by reflecting more than a record of military service, brings reproach and dishonor in civilian life?

As the law now stands, we lack jurisdiction to review or grant relief and are constrained to hold that summary judgment be granted to defendant.

Defendant will prepare an order consistent with this finding.

LUTHER W. YOUNGDAHL
Judge

January 24, 1956

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[4] The scope of the courts' power to review or control the action of the military in fixing the type of discharge certificate issued to soldiers has not as yet been clearly delineated by the Supreme Court. See *Patterson* v. *Lamb*, 329 U.S. 539, 542 (1947).

[5] United States ex rel Toth v. Quarles, 350 U.S. 11 (Dec. 7, 1955).

209 Filed February 6, 1956

Order

This cause having been heard on cross motions for summary judgment, and it appearing that plaintiff who was discharged from the Army with an undesirable discharge brings this action against the Secretary of the Army to obtain judicial review of the character of the discharge given him, and that this Court lacks authority to review, control, or compel the granting of particular types of discharge certificates;

Now, THEREFORE, it is hereby ordered, pursuant to the memorandum of the Court dated January 24, 1956, that plaintiff's motion for summary judgment be and it hereby is denied; that defendant's motion for summary judgment be and it hereby is granted; and that the complaint be and it hereby is dismissed.

/s/ LUTHER W. YOUNGDAHL
Luther Youngdahl
District Judge

Dated: 3 Febuary, 1956

SEEN:
JAMES H. HELLER
Counsel for Plaintiff

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210 **Notice of Appeal**

Notice is hereby given this 21st day of February, 1956, that Plaintiff, John Henry Harmon, III hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 6th day of February, 1956 in favor of defendant, William M. Brucker against said John Henry Harmon, III.

JAMES H. HELLER
Attorney for Plaintiff
1026 Woodward Building
Washington, D. C.

Civil Docket

(C.A. No. 1972-55)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Date	Proceedings
1955	Deposit for cost by
May 2	Complaint, appearance, Exhibits (2) filed
May 2	Summons, copies (1) and copies (1) of Complaint issued Served 5-3-55 U. S. Atty. Served 5-2-55 filed
June 16	Appearance of James H. Heller for pltf. Atty. Gen. Served 5-3-55 filed
July 19	Answer of deft. to complt; c/m 7-18-55; app. Joseph D. Guilfoyle, Edward H. Hickey & Donald B. MacGuineas. filed
July 19	Calendared (N)
Aug. 25	Motion of pltf. for summary judgment, affidavit of pltf; P & A; c/m 8-25-55; M.C. 8-25-55 filed
Sept. 7	Stipulation extending time for deft. to answer plf's motion for summary judgment to 9-16-55. filed
Sept. 8	Motion of pltf. to file supplemental complt. & substitute party deft; P & A; exhibit; ack ser. 9-8-55. filed.
Sept. 8	Order grating Pltf. leave to file supplemental complaint and substituting Wilber M. Brucker, individually and as Sec. of the Army in place and instead of Robert T. Stevens as party deft. (N) Holtzoff, J.
Sept. 8	Supplemental complaint substituting Wilber M. Brucker, individually and as Sec. of the Army in place and instead of Robert T. Stevens as party deft; affidavit; ack. of ser. 9-8-55; filed
Sept. 15	Stipulation extending time for deft. to answer motion for summary judgment to 9-30-55. filed
Oct. 7	Motion of deft. for extension of time to respond to pltff's. motion for summary judgment; c/m 10-7-55 filed

Oct. 11 Opposition of pltf to motion to extend time to answer motion for summary judgment, P&A, c/m 10-11-55

Oct. 13 Order extending deft's time to file opposition to motion for summary judgt. to 10-21-55. (N) Laws, C. J.

Oct. 21 Motion of deft for extension of time to respond to motion for summary judgment, affi., c/m 10-21-55 filed

Oct. 22 Pltf's opposition to deft's 2nd motion to extend time to answer pltf's Motion for summary judgment, P&A, c/m 10-21-55 filed

Oct. 25 Order granting defendant's motion for extension of time to file opposition to motion for summary judgment until Nov. 15, 1955. Tamm, J. (N)

Nov. 15 Motion of deft for summary judgment, affidavits (2) & exhibits (2) affidavit (1), M.C. 11-15-55. filed

Nov. 15 Brief of deft in support of motion for Summary Judgment & in opposition to Pltff's Motion for summary judgment appendix. filed

Nov. 22 Motion of Deft for leave to amend answer, c/m 11-22-55. filed

Nov. 23 Reply of pltf to defts brief & in opposition to motion for summary judgt, affi, exhibits A thru J, c/m 11-23-55 filed

Nov. 28 Opposition to motion for leave to amend answer. C/s 11-28-55 filed

Nov. 28 Motion of pltf for summary judgt. and motion of deft for summary judgt; argued and submitted. Rep. Delehanty Youngdahl, J.

Nov. 29 Amendment to answer of deft. c/m 11-28-55. (Fiat) Youngdahl, J.

1956

Jan. 24 Memorandum opinion. Youngdahl, J. (N)

Feb. 6 Order denying Pltff's motion for summary judgment & granting Deft's motion for summary judgment, & further that complt. be dismissed. (Signed 2-3-56) Youngdahl, J. (N)

Feb. 21 Motion of appeal of pltf from judgt. of 2-6-56; deposit $5.00 by James H. Heller, copies mailed to U. S. Atty. Atty. Gen. & Donald B. MacGuineas. filed

Feb. 21 Cost bond of pltf on appeal in sum of $250 with United States Fidelity & Guaranty Co. filed

Feb. 24 Plaintiff's designation of record on appeal, c/m 2-24-56 filed

Feb. 24 Plaintiff's statement of points on appeal, c/m 2-24-56 filed

Feb. 29 Motion respecting Record on Appeal, P & A, c/m 2-28-56. filed

Feb. 29 Plaintiffs Exhibits A. filed

Feb. 29 Defendants Exhibits # 1, 2 & 3. filed

Feb. 29 Order allowing Pltff. to withdraw his designation of contents of record on Appeal & statement of points on appeal, and further directing Clerk of Court to transmit to U. S. Court of Appeal for D. C. Circuit all original papers & exhibits & to prepare a certified copy of all docket entries in this action for transmission to U. S. Court of Appeal for D. C. Circuit. Youngdahl, J. (N)

Mar. 19 Record on Appeal delivered. Deposit by James H. Heller, $.50. filed

[fol. 109] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

Excerpts from Appendix to Appellee's Memorandum Suggesting Mootness—Filed July 17, 1956

[fol. 110] AFFIDAVIT OF JOHN F. BURNS—June 19, 1956

Department of the Army
The Pentagon
Washington 25, D. C.

John F. Burns, Major, United States Army, being duly sworn deposes and says:

I am the Chief of the Discharge Unit, Enlisted Section, Separations Branch, Personnel Division, Office of the Adjutant General. In this official capacity I process, issue, review and coordinate the discharges of enlisted personnel of the Army. The records of my office show that on 11 April 1956, the Army Discharge Review Board had reviewed the matter of the discharge of John Henry Harmon, III, and recommended that the character of the discharge previously issued to John Henry Harmon, III, be changed from an Undesirable Discharge to a General Discharge under honorable conditions. Pursuant to the approval of the recommendation by the Secretary of the Army notification was forwarded to John Henry Harmon, III, on 7 June 1956 of the fact that the character of his discharge was changed from Undesirable to a General Discharge under honorable conditions. In this letter John Henry Harmon, III, was advised that before a new Report of Separation (DD Form 214) and Certificate of General Discharge (DD Form 257A) could be mailed to him, present administrative procedures required that he return to my office by mail the old report of Separation of Service and the Certificate of Undesirable Discharge which had been previously issued to him. A copy of the letter is attached to the affidavit as Inclosure 1. Upon receipt of the old Report of Separation (DD Form 214) and the Certificate of Undesirable Discharge (DD Form

258A), I will mail to John Henry Harmon, III, the new Report of Separation (DD Form 214) and Certificate of General Discharge under honorable conditions (DD Form 257A) which reflect the change of character of discharge [fol. 111] from the United States Army. Copies of these last two mentioned documents are attached as Inclosures 2 and 3 respectively.

John F. Burns, Major, AGC, United States Army.

Department of the Army
The Pentagon
Washington 25, D. C.

Subscribed and sworn before me this 19th day of June 1956.

Peter S. Wondolowski, Lieutenant Colonel, JAGC,
Authorized to administer oaths by 50 USC 732.

[fol. 112] INCLOSURE 1 TO AFFIDAVIT

6 June 1956

AGPO-XD 201 Harmon, John H., III
US51 207 184 (6 Jun 56)
Mr. John H. Harmon, III
601 East 226 St
Bronx, New York

Dear Mr. Harmon:

Reference is made to DD Form 214 furnished you upon separation from active military service on 2 June 1954.

A review of your records has been made and it has been determined by this office that the character of separation showing "Undesirable" is now recharacterized "General (Under Honorable Conditions)."

It is requested that you return your copy of DD Form 214 and the discharge certificate to this office, attention AGPO-XD. Upon receipt, you will be furnished a corrected copy of DD Form 214 and a corrected Discharge Certificate showing your character of separation as "General."

Sincerely yours,

John A. Klein, Major General, USA, The Adjutant General.

(Here follow 2 photo lithographs)

Note

Pages 111 and 112 are
on Card 2.

[fol. 115] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

Excerpt from Appendix to Appellant's Statement in Opposition to Appellee's Memorandum Suggesting Mootness—Filed August 8, 1956

[fol. 116] AFFIDAVIT OF DAVID I. SHAPIRO—June 1, 1956

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

DAVID I. SHAPIRO, being duly sworn, deposes and says:

On June 1, 1956, at 3:30 P. M. of that day, your deponent spoke to Mr. Murphy, Assistant Secretary of the Committee on Character and Fitness for applicants for admission to the Bar of the State of New York, First Judicial Department, with respect to applicants who received a "General Discharge under Honorable Conditions" from military service.

Your deponent was informed that an applicant who received a "General Discharge under Honorable Conditions" from the Army of the United States, rather than an "Honorable Discharge," would be seriously prejudiced with respect to his admission to the Bar by reason of said "General Discharge"; that the determination of the Secretary of the Army that the applicant's military service was other than that which warranted an "Honorable Discharge" was a factor to be considered by the Committee on Character and Fitness for the First Judicial Department of the State of New York in determining whether the applicant had that "character, loyalty, and fitness" enabling him to be considered favorably for admission to the Bar of the State of New York; that a "General Discharge under Honorable Conditions" would undoubtedly hold up the applicant's admission to the Bar by reason of an investigation

and the subsequent determination thereon, which, even if favorable, would take considerable time, delaying the appli- [fol. 117] cant's admission to the Bar, whereas, if the applicant had received an "Honorable" discharge, that delay would not necessarily be encountered.

DAVID I. SHAPIRO.

Sworn to before me this
1st day of June, 1956.

HAROLD FRIEDMAN
Harold Friedman
Notary Public, State of New York
No. 41-6412025—Qual. in Queens Co.
Commission Expires March 30, 1958

[fol. 118] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

Excerpt from Appendix to Brief for Appellee—Filed May 18, 1956

[fol. 119] EXCERPT FROM PLAINTIFF'S EXHIBIT A

Filed Feb. 29, 1956

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

Room 1E-512, The Pentagon
Washington 25, D. C.

Harmon, John H., III, US 51 207 184, Ref. File Nos. 1.12 & 13.21.

Appearing: Appl: Yes.

Counsel: David I. Shapiro, Esquire, 350 5th Ave., N.Y. 1, N.Y.

Review Set For: 27 July 1955.

CASE SUMMARY

* * * * * * * * *

10. (Service Record) Appl's character and efficiency ratings during service were as follows:

Character	Efficiency	From	To	Organization
Unk	Unk	31 Oct 52	13 Nov 52	Camp Kilmer, N. J.
Excellent	Excellent	14 Nov 42	28 Jul 53	IGMR, Pa.
Unk	Unk	29 Jul 53	1 Aug 53	Camp Pickett, Va.
Excellent	Excellent	2 Aug 53	24 Apr 54	Camp Pickett, Va.
Unk	Unk	25 Apr 54	13 May 54	Camp Pickett, Va.
Unk	Unk	14 May 54	2 Jun 54	Camp Pickett, Va. (disch)

* * * * * * * * * * *

"For Official Use Only"

[fol. 120] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,230

JOHN HENRY HARMON, III, Appellant,

v.

WILBER M. BRUCKER, Secretary of the Army, Appellee.

Before: Wilbur K. Miller, Bastian and Burger, Circuit Judges, in Chambers.

ORDER DENYING SUGGESTION OF MOOTNESS—August 17, 1956

Upon consideration of appellee's suggestion of mootness, wherein appellee suggests that this Court dismiss the appeal and remand the case with directions to the District Court to dismiss the case as moot, and of appellant's statement in opposition thereto, it is

ORDERED by the Court that the aforesaid suggestion of mootness be, and it is hereby, denied.

Per Curiam.

Dated: August 17 1956

Circuit Judge Burger did not participate in the foregoing order.

[fol. 121] IN UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13230

JOHN H. HARMON, III, Appellant,

v.

WILBER M. BRUCKER, Individually and as Secretary of the Department of the Army, Appellee.

Appeal from the United States District Court for the District of Columbia

OPINION—January 31, 1957

Mr. David I. Shapiro, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of Court, with whom *Mr. James H. Heller* was on the brief, for appellant.

Mr. Donald B. MacGuineas, Attorney, Department of Justice, with whom Assistant Attorney General *George Cochran Doub, Mr. Oliver Gasch,* United States Attorney, and *Messrs. Samuel D. Slade* and *Howard E. Shapiro,* Attorneys, Department of Justice, were on the brief, for appellee.

Before PRETTYMAN, BAZELON and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge:* John Henry Harmon, III, was inducted into the Army on October 31, 1952, under [fol. 122] the Universal Military Training and Service Act of 1948.[1] In May, 1953, some questions concerning membership in and relations with the Communist Party, and similar matters, were addressed to him by Army officials. He replied under oath, answering some questions and refusing to answer others on the ground of possible self-incrimination; his answers were reduced to writing and signed by him. In February, 1954, he was notified by the Adjutant General of the Army that he should reply to

[1] 62 STAT. 604, 50 U.S.C.A. App. § 451 *et seq.*

certain derogatory information which had been received concerning him. This derogatory information was itemized in seven specifications, "a" to "g". Items "a" through "d" and Item "g" concerned reported activities on Harmon's part, Item "e" activity on his father's part, and Item "f" activities on his stepmother's part. Harmon replied to the items concerning himself, but as to Items "e" and "f" he said: "It is with deepest moral indignity coupled with a devout sense of filial piety, that I refuse to answer the derogatory statements made under allegations e and f. As neither my father nor stepmother are employed in any capacity by the federal government, I am led to the conclusion that derogatory information concerning them is wholly irrelevant to the case at hand." Thereafter Harmon was informed that his discharge as disloyal or subversive under Army Regulation 615-370 had not been favorably considered and that he would be retained in the service in his then-present grade. Shortly thereafter the Secretary of Defense issued Directive 5210.9, the purpose of which was to apply to military personnel the security programs established by Executive Order 10450 in respect to civilian Government employees. It directed that the standard for retention within the armed services should be "that on all the available information it is determined that the * * * retention is clearly consistent with the interests of national security." [fol. 123] The directive was accompanied by a memorandum from the Secretary, directing that a review be made of all cases which had theretofore been cleared. Thereupon Harmon's case was reviewed, and the Army Personnel Board found that his further retention in the service was inconsistent with the interests of national security and recommended that he be discharged with an undesirable discharge. On June 2, 1954, he was discharged as undesirable. Harmon appealed to the Army Discharge Review Board to have the character of his discharge changed from undesirable to honorable. He was given a hearing, at which he appeared, and thereafter his application for a change was denied. He applied to the Army Board for the Correction of Military Records for the change in his discharge, and that application was denied. He then made a direct request to the Secretary for award of an

honorable discharge, and this request was reviewed by an Assistant Secretary, who referred it to the Board for the Correction of Military Records. Harmon declined a hearing before that Board, stating that he had no additional facts to present. He took the position that the discharge certificate must accurately and adequately reflect the character of his military service and that, inasmuch as the character of this service, as set forth in his service record, was "excellent", he should receive an honorable discharge. The Board recommended against a change in the discharge, and the Assistant Secretary approved that recommendation.

Harmon filed a complaint in the District Court, praying that the action of the Secretary in discharging him with an undesirable discharge be declared null, void and illegal as in violation of the Constitution, the statutes, and Army regulations; and that his discharge be ordered changed from undesirable to honorable. On February 3, 1956, the District Court granted the Secretary's motion for summary judgment, on the ground that the court lacked authority to review, control or compel the granting of par-
[fol. 124] ticular types of discharge certificates to persons discharged from the Army.[2] Harmon appealed. Thereafter the Army Discharge Review Board, in the course of a general review of military personnel security cases, reviewed Harmon's case, and the character of his discharge was changed from undesirable to general under honorable conditions. He was thereupon issued a discharge certificate reading:

GENERAL DISCHARGE

Under Honorable Conditions

from the Armed Forces of the United States of America

This is to certify that

John Henry Harmon III US51 207 184 Private AUS

was Discharged from the

ARMY OF THE UNITED STATES

on the 2d day of June 1954 under honorable conditions

[Signed] R L Richstatter

R L RICHSTATTER

Captain Adjutant General's Corps

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[2] Harmon v. Brucker, 137 F.Supp. 475 (1956).

The Secretary suggested to this court that the case thus became moot. Harmon opposed the suggestion, upon the ground that the controversy was whether he should receive an honorable discharge. This court, on August 17, 1956, by order denied the Secretary's suggestion of mootness.

The alleged derogatory information concerning Harmon which was incorporated in Items "a", "b" and "c" of the initial notice of the Adjutant General concerned activities in 1951 and 1952 in a camp reported to be Communist-operated, employment in 1949 in an organization reported to be subversive, and registration in 1952 with the American Labor Party, cited by the House Committee as being [fol. 125] under Communist control. All these alleged activities were prior to Harmon's induction into the Army. Item "d" was that Harmon "Solicited contributions of money for the defense of persons under indictment for violation of the Smith Act." Within a month after his induction into the Army Harmon wrote a letter to two friends, suggesting that they make a financial contribution to assist in the defense of two individuals who had been indicted under the Smith Act. Item "g" was that Harmon had been "Associated with persons who were Communists or Communist sympathizers." In response to this item Harmon said he was not then nor had he ever been a member of the Communist Party but that in the course of appearances before many groups and audiences it was quite possible that he had known or been acquainted with Communists or their sympathizers.

In respect to Harmon's military service the Secretary says that his (Harmon's) service record was marked "excellent" for the periods November 12, 1952, to July 24, 1953, and from August 2, 1953, to April 24, 1954, and that for the balance of his service his record was marked "unknown" as to character and efficiency.

As the case is now before us, the questions are (1) whether the court can declare null and void the action of the Secretary in discharging Harmon with a "General Discharge Under Honorable Conditions" and (2) whether the court can order the Secretary to change Harmon's discharge from "General Discharge Under Honorable Con-

ditions" to "Honorable Discharge". We agree with the District Judge that the court cannot take either of such actions.

The nub of Harmon's contention on the first question is that he is entitled to judicial review of the Army's action. He does not contend that he could not be discharged; his complaint goes to the type of discharge given him. He was accorded all the procedural steps established by the Army regulations for the consideration and determina- [fol. 126] tion of the propriety of discharges from the military service. As we have pointed out, he specifically told the Army authorities that he had no further facts to present. No statute was misapplied in the process or the substance of the discharge. No statute directs or authorizes judicial review of Army discharges. Indeed the statute provides that decisions of the Army boards shall be final.[3] Thus Harmon's argument must rest upon constitutional grounds: that as a matter of due process of law or by some other constitutional requirement he was entitled to court review of the type of discharge which he should be given.

The Constitution provides that the President shall be Commander in Chief of the Army and Navy of the United States[4] and that Congress shall have power to make rules for the government and regulation of the land and naval forces.[5] Title 10 of the United States Code clearly expresses a Congressional intent that the Army be administered solely by the executive branch of the Government.[6] The statute in effect at the time of Harmon's discharge provided[7] that "No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge,

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[3] Act of June 22, 1944, 58 STAT. 286, as amended, 38 U.S.C.A. § 693h.

[4] Art. II, § 2, cl. 1.

[5] Art. I, § 8, cl. 14.

[6] 10 U.S.C. § 3012 (1956) [formerly 5 U.S.C.A. § 181—4, 64 STAT. 264 (1950).

[7] 41 STAT. 809 (1920), as amended, 10 U.S.C.A. § 652a (Supp. 1956) [now 10 U.S.C. § 3811 (1956)].

and no enlisted person shall be discharged from said service before his term of service has expired, *except in the matter prescribed by the Secretary of the Department of the Army,* or by sentence of a general or special court-[fol. 127] martial." (Emphasis ours.) Throughout our history the Articles of War and similar statutes have entrusted to the Secretary of War and his agents the granting of certificates of discharge.[8] The statute which authorized the Secretary to establish a board to review the types and natures of discharges specifically provided that the findings of such a board should be "final subject only to review by the Secretary of the Army".[9] The courts have held many times that they have no power to review the administrative processes by which the President and the Secretaries administer the affairs of the Army, and this doctrine has extended to the nature of discharges from the service.[10] On this subject we said in *Gentila* v. *Pace*:[11]

[fol. 128] "We think Congress intended that the Board's [the Army Discharge Review Board's] full

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[8] WINTHROP, MILITARY LAW AND PRECEDENTS 547, 931, 933, 961, 972 (2d ed. 1920); Act of April 2, 1806, 2 STAT. 359, 361; REV. STAT. § 1342, Art. 4 (2d ed. 1878); Sec. 4(b), Selective Service Act of 1948, 62 STAT. 606, as amended, 50 U.S.C.A. App. § 454(b).

[9] *Supra* note 3.

[10] United States v. Eliason, 41 U.S. (16 Pet.) 291, 301-302, 10 L.Ed. 968 (1842); Reaves v. Ainsworth, 219 U.S. 296, 304, 306, 55 L.Ed. 225, 31 S.Ct. 230 (1911), *affirming* 28 App. D.C. 157 (D.C. Cir. 1906); Creary v. Weeks, 259 U.S. 336, 66 L.Ed. 973, 42 S.Ct. 509 (1922); French v. Weeks, 259 U.S. 336, 66 L.Ed. 965, 42 S.Ct. 505 (1922); Reid v. United States, 161 Fed. 469 (S.D.N.Y. 1908), *writ of error dismissed,* 211 U.S. 529, 53 L.Ed. 313, 29 S.Ct. 171 (1909); Davis v. Woodring, 72 App. D.C. 83, 111 F.2d 523 (D.C. Cir. 1940); Schustack v. Herren, 234 F.2d 134 (2d Cir. 1956); Nelson v. Peckham, 210 F.2d 574 (4th Cir. 1954); Bernstein v. Herren, 136 F.Supp. 493 (S.D.N.Y. 1955), 141 F.Supp. 78 (S.D. N.Y. 1956), *aff'd,* 234 F.2d 434 (2d Cir. 1956); Weeks v. United States, 51 App. D.C. 195, 277 Fed. 594 (D.C.Cir. 1922), *aff'd sub nom.* Creary v. Weeks, 259 U.S. 336, 66 L.Ed. 973, 42 S.Ct. 509 (1922); Marshall v. Wyman, 132 F.Supp. 169 (N.D.Cal. 1955); Nordmann v. Woodring, 28 F.Supp. 573 (W.D.Okla. 1939); McKenzie v. Kirkpatrick, 141 F.Supp. 49 (N.D.Cal. 1956).

[11] 90 U.S. App. D.C. 75, 77, 193 F.2d 924, 927 (1951), *cert. denied,* 342 U.S. 943, 96 L.Ed. 702, 72 S.Ct. 556 (1952).

> and 'final' review should not be subjected to a further review, or series of reviews, in the courts. We may suppose that Congress considered the heavy burden that would be imposed upon courts if they were required to review the findings upon which Army discharges are based. As the Supreme Court has said in regard to a type of dispute for which the Railway Labor Act provides, the 'intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.' Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 305, 64 S. Ct. 95, 99, 88 L. Ed. 61."

It is said that the foregoing statement was *dictum*. Whether that be so or not, we think the statement is correct. We adhere to it and adopt it for application here.

The import of the opinion of the Supreme Court in *Orloff* v. *Willoughby*[12] is the same as that of the opinions we have cited. There a physician inducted into the Army under the Doctors Draft Act[13] refused to state whether he was a member of the Communist Party. Because of this refusal he was not commissioned or given the duties of an Army doctor. He applied to a federal court for *habeas corpus* and for a discharge. He urged that it had been a uniform practice to commission Army doctors and, furthermore, that his induction under the Doctors Draft Act contemplated and required that he be given a commission. The Supreme Court held that the courts have no power to review such a matter, which fell within the [fol. 129] executive duties of the President and the Army. The Court observed:

> "We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not

[12] 345 U.S. 83, 97 L.Ed. 842, 73 S.Ct. 534 (1953).

[13] 64 STAT. 826 (1950), 50 U.S.C.A. App. § 454(i).

given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service." [11]

Reason and the practicalities dictate the rule which we have found in the cases. Reason, flowing from the doctrine of the separation of powers, dictates that in many fields the administrative discretion of the executive branch and the legislative discretion of the legislative branch be not subject to interference or review by the courts. In no field is this doctrine more pertinent and important than in the operation of the armed forces. Provisions for the establishment and operation of such forces necessary to the security of this country are wholly legislative matters, and the administration of those forces is the very essence of executive action. The Constitution so provides. Only in the most extreme cases can the judiciary interfere in this area. As a practicality the operation of military forces requires expeditious, sometimes instant, action [fol. 130] and thus requires discipline. From the standpoint of the Army it is easy to see the disastrous effect upon discipline if the type of discharge which could be given an enlisted man were not within the power of his commanding officer or the Secretary, but were subject to litigation and to review and decision by a court wholly removed from the necessities of military affairs. As a fur-

[11] 345 U.S. at 93-94.

ther matter of practicality, from the standpoint of the courts review of such matters would impose an appalling burden, with which the courts are wholly unequipped to cope.

Harmon's insistence is that the type of discharge given him must be determined by the character of his military service and without regard to pre-induction events, activities, etc. But that is not our question. Our question is not what type of discharge he ought to be given; it is whether a court can review and determine the type of discharge. Harmon says a court can and must do so. To reach that conclusion a number of propositions are suggested.

The first such proposition concerns procedural due process. Harmon was given an opportunity to reply to the alleged derogatory information and was then issued a discharge. Thereafter he was given a hearing before the Army Discharge Review Board. He appealed that Board's adverse decision to the Army Board for the Correction of Military Records, again without success. Later, in connection with a direct appeal to the Secretary, he was offered a second hearing, which he declined. Harmon was thus given the full measure of procedural rights afforded by the Congress for persons in the military service. The Supreme Court held in *Reaves* v. *Ainsworth*,[15] "Besides, what is due process of law must be determined by circum- [fol. 131] stances. To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts."

Harmon urges that the Army violated Directive 5210.9 by failing to give him a hearing. He was notified on May 26, 1954, of his proposed discharge. The Directive provides "an opportunity upon request to present any cause why he should not be so separated." Harmon made no such request. Later, as we have pointed out, he was afforded a hearing before the Review Board. The requirements of procedural due process were fully met.

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[15] 219 U.S. 296, 304, 55 L.Ed. 225, 31 S.Ct. 230 (1911). And see Burns v. Wilson, 346 U.S. 137, 97 L.Ed. 1508, 73 S.Ct. 1045 (1953).

We find no question of substantive due process. The consideration of pre-induction activity was not frivolous, arbitrary or discriminatory; it was based upon reasonable grounds. Activity in the Communist movement involves participation in a conspiracy dangerous to our national security. Surely the Army cannot be compelled to retain a security risk in its service. Surely the President may apply to military personnel the same program and policies as to security and loyalty which he applies to civilian personnel in sensitive positions in the Government civilian service.[16] Harmon does not contend that he could not be separated from the service because of pre-induction conduct. If that be so, if he can be discharged as a security risk, the Army can determine whether he is or is not a security risk. And in that determination surely no data is more relevant and material than are his past habits, activities and associations. Such data is universally the material from which a determination of character or suitability is made, if indeed it is not the only material [fol. 132] from which it can be made. The Army, in making that determination, was not trying to find him guilty or not guilty of some act or offense. It was trying to determine his character as a security risk *vel non* and his consequent suitability for Army service. If it could make that determination, as admittedly it could, and upon that basis could determine whether a man was suitable for any service whatsoever, it could include that consideration among the factors to be considered in determining the value of his service and, consequently, in selecting the type of discharge to be given him. Moreover it is reasonable for Army authorities to believe that a security risk is not usable for many types of military service required of other soldiers, and that factor may well affect the value of the military service of such a person and, consequently, the type of discharge given him.

An honorable discharge from the Army, is, as Harmon claims it is, a mark of distinction. The courts cannot

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[16] See Cole v. Young, 351 U.S. 536, 100 L.Ed. 1396, 76 S.Ct. 861 (1956); *cf.* Jason v. Summerfield, 94 U.S. App. D.C. 197, 214 F.2d 273 (D.C.Cir. 1954), *cert. denied*, 348 U.S. 840, 99 L.Ed. 662, 75 S.Ct. 48 (1954).

dictate to the Army that it must give this mark to an enlisted man when it finds, on the basis of pre-induction activities, that his presence in the armed forces is not consistent with the national security.

It is suggested that a general discharge under honorable conditions imposes a "stigma" and so is punishment. Punishment, it is said, cannot be inflicted without judicial scrutiny. The Army can impose punishment, even the punishment of death, without judicial review.[17] Moreover the type of a discharge is not punishment in the sense that judicial process is required. No finding of guilt, no loss of liberty are involved. The penalty is the same as that which results from many unhappy experiences. Consideration of such "penalties" must begin in perspective. A discharge from civilian, commercial employment carries penalties in a real sense—stigma, loss of pay, difficulty [fol. 133] in subsequent employment; but no one would suggest that an employer cannot discharge an employee without judicial scrutiny. A civilian employee of the Government can be dismissed upon charges of a criminal offense without judicial review.[18] The courts do not interfere in such matters. When the same "penalties" arise from action of military authorities, they do not thereby become "punishment" necessitating judicial action.

Stigma attaches on rejection from military service as a security risk. Indeed, if one be rejected entirely, on account of being a security risk, the adverse effects are greater than upon receiving a General Discharge Under Honorable Conditions. Many benefits attach to status under the latter which do not attach to rejection. And the intangibles of stigma attach in either event. Nevertheless it certainly cannot be urged that the Army may not reject, without judicial review, as a security risk one registered for service.

It is suggested that an honorable discharge is of so great value that a man can be denied one only if he be

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[17] Burns v. Wilson, 346 U.S. 137, 97 L.Ed. 1508, 73 S.Ct. 1045 (1953).

[18] See, *e.g.*, Eberlein v. United States, 257 U.S. 82, 42 S.Ct. 12, 66 L.Ed. 140 (1921).

afforded a right to judicial review. To hold to that effect would be to vitiate the whole discharge process provided by the Secretary.[19] The courts have no authority to take such action. They cannot arrogate to themselves supervisory authority over the Army. Apt on this point is another quotation from *Reaves* v. *Ainsworth, supra*. The Supreme Court said:

> [fol. 134] "The courts have no power to review. The courts are not the only instrumentalities of government. They cannot command or regulate the army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the army. • • • If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined." [20]

There is a margin of value of an "Honorable Discharge" over a "General Discharge Under Honorable Conditions". But a considerable measure of value is involved in a Government job, such as was involved in *Williams* v. *Cravens*,[21] and in the rights of a contractor, such as were involved

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[19] On March 18, 1954, Robert T. Stevens, then Secretary of Defense, told the Senate Armed Services Committee: "When the evidence fails to show that he is disloyal, or is subversive, but does establish that he is otherwise a security risk and should be eliminated, he is separated under honorable conditions, usually with a general discharge." *Hearings on S. 3096*, 83d Cong., 2d Sess. 75.

[20] 219 U.S. at 306.

[21] 93 U.S. App. D.C. 380, 210 F.2d 874 (D.C.Cir. 1954), *cert. denied*, 348 U.S. 819, 99 L.Ed. 646, 75 S.Ct. 30 (1954).

in *Larson* v. *Domestic & Foreign Corp.*,[22] and in a public utility business, such as was involved in *Kansas City Power & Light Company* v. *McKay*.[23] Yet in all these instances the holders of the rights were deprived of them without court review.

It is suggested that the consideration of pre-induction happenings is in conflict with the traditional policies of the Army. Most certainly we cannot order the Army to [fol. 135] adhere to traditional practices. The armed forces in 1953-54 faced many new problems not involved in the operation of the military services of the 1770's, or the 1860's, or in 1917-18, or even in the early 1940's. Activity in the Communist movement now involves a possible conspiratorial participation dangerous to the security of this country. The efforts of this movement to infiltrate all parts of the Government pose new problems, which must be met with new rules and regulations.

Harmon argues that the pre-induction events considered by the Army were political opinions and so could not validly be considered under the First Amendment. Activity in the world Communist movement has long since passed the boundaries of mere political opinion. It may well make a man a security risk, and, as we have pointed out, the courts cannot compel the Army to retain in its service a security risk.

We come now to the second of Harmon's prayers, that the court direct the issuance to him of an honorable discharge. It is settled beyond question that the courts will not direct by *mandamus* any executive action which lies within the realm of executive discretion.[24] This is a rule of law quite apart from the peculiar insulation of Army affairs from judicial scrutiny. Harmon's prayer that the court direct the issuance to him of an honorable discharge

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[22] 337 U.S. 682, 93 L.Ed. 1628, 69 S.Ct. 1457 (1949).

[23] 96 U.S. App. D.C. 273, 225 F.2d 924 (D.C.Cir. 1955), *cert. denied*, 350 U.S. 884, 100 L.Ed. 780, 76 S.Ct. 137 (1955).

[24] Anderson v. McKay, 94 U.S. App. D.C. 11, 211 F.2d 798 (D.C.Cir. 1954), *cert. denied*, 348 U.S. 836, 99 L.Ed. 660, 75 S.Ct. 51 (1954). See discussion and cases cited in Clackamas County, Ore. v. McKay, 94 U.S.App. D.C. 108, 219 F.2d 479 (D.C.Cir. 1954).

is certainly a prayer for *mandamus,* and certainly the Congress has lodged within the area of executive discretion the selection of types of discharges to be given military personnel. So this prayer in Harmon's complaint does not lie within the jurisdiction of the court under the general rule applicable to all types of executive action. Even if such a prayer for mandatory direction ran [fol. 136] only to a civilian matter which had none of the elements of a military affair, the courts would have no authority in respect to it.

Affirmed.

BAZELON, *Circuit Judge,* dissenting: Appellant is a youth who was plucked out of civilian life and made a soldier, as are many others, at the threshold of the career he was planning for himself. Before the end of his term of service, he was restored to his civilian status, but hung about his neck was the millstone of "security risk." The Army has information about his civilian activities and associations on the basis of which it believes it would not be in the national interest to retain him as a soldier, but his military service is admitted to have been "excellent" and he is not claimed to have done anything illegal or reprehensible during his tour of duty. He does not challenge the discretion of the Secretary of the Army to judge whether the national security is served by dismissing a soldier. He complains only that, in the exercise of that discretion, there is neither necessity nor authority for inflicting upon him a gratuitous wound which may plague him all the rest of his days.

Appellant was inducted into the Army on October 31, 1952, as a draftee. On February 9, 1954, the Adjutant General of the Army informed him that the Army had received "derogatory" information about him and ordered him to reply thereto. He replied in writing on March 11, 1954. On April 2, 1954, the Adjutant General of the Army, acting by order of appellee, informed appellant that, upon review of the derogatory information and appellant's replies thereto, it had been determined that appellant would not be discharged under AR 615-370 as

disloyal or subversive, but would be retained in his grade until completion of his service period, at which time he would receive a discharge "appropriate to the character [fol. 137] of service" he had rendered.[1] Five days later, the Secretary of Defense promulgated his Directive 5210.9, purporting to apply to military personnel the criteria of the civilian security program, Executive Order 10450 (April 27, 1953, 18 FED. REG. 2489), and to authorize dismissal of a soldier as a security risk if "on all the available information it is determined that [his] retention is [not] clearly consistent with the interests of national security." On May 26, 1954, the determination to let appellant complete his service was reversed and he was informed that he would be given an "undesirable" discharge under AR 615-370 prior to the expiration of his service period. On June 2, 1954, he received such a discharge.[2]

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[1] This comported with the traditional Army policy that the type of discharge be governed entirely by the service record, absent some disqualification covered by specific regulation. Thus, though a less than honorable discharge certificate can be given to a homosexual, a drug addict, a chronic alcoholic, a habitual shirker, a person with psychopathic personality, or a repeated petty offender (AR 635-208, formerly AR 615-368); to a deserter, a soldier who has entered the Army by fraud, or one who is convicted of crime in a civil court (AR 635-206, formerly AR 615-366); or to one who is "determined by investigation to be disloyal or subversive" (AR 615-370, as implemented by Special Regs 600-220-1); where there is no such fault, an honorable discharge is called for if the soldier's conduct has been rated at not less than "good" and his efficiency at not less than "fair" (AR 635-200, par. 8). Former Secretary of the Army Stevens told a Senate Committee:

> The traditional policy of the Army has been that the discharge given should reflect the service rendered. In other words, a man whose conduct has been faithful and honest during the time in the service would be entitled to separation under honorable conditions, notwithstanding what his conduct may have been prior to entering the service. *Hearings, Senate Armed Services Committee on S. 3096*, 83d Cong., 2d Sess., March 18, 1954, at p. 75.

[2] Defense Directive 5210.9 provides that the separation report of a soldier discharged as a security risk "will cite as authority the appropriate Armed Service directive under which separation is effected." Par. VIII-F-6. On June 2, 1954, when appellant was given his undesirable discharge, there was no specific Army direc-

[fol. 138] Appellant sought unsuccessfully to have his discharge changed to "honorable," first by appeal to the Army Discharge Review Board and then, in turn, to the Army Board of Correction of Military Records and the Secretary of the Army. Having exhausted all possible administrative remedies, he commenced this suit seeking a declaration that his undesirable discharge was void and an order that it be changed to an honorable discharge. Cross-motions for summary judgment were made. The District Court, concluding that it lacked jurisdiction of the cause, denied appellant's motion and entered summary judgment against him. This appeal followed.

The derogatory information the Army had about appellant was that he had been employed at what was "reported to be a Communist operated camp"; that he had been employed by the Detroit Urban League, "reported [fol. 139] to be a subversive organization"; that he had once "registered to vote in New York City with the American Labor Party . . . cited by the House Committee on Un-American Activities as being under Communist control . . ."; that he had solicited contributions for the defense of Smith Act prosecution defendants; that his father was reported to be a Communist, and connected with various organizations cited as subversive by the Attorney General and to have registered many times with the American Labor

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tive dealing with security risks. AR 615-370, which was cited in the separation report as authority for the discharge, permits an undesirable discharge only upon a determination that the soldier is "disloyal or subversive." No such determination having been made regarding appellant, AR 615-370 was inapplicable. Indeed, appellee asserts that it was cited by mistake, the real basis for appellant's discharge being Directive 5210.9 itself.

By the time the Army Discharge Review Board reviewed appellant's discharge on April 11, 1956, and upgraded it to "General," the Army had already promulgated its specific "Personnel Security Clearance" regulations, AR 604-10, July 29, 1955. But those new regulations were not cited in the corrected separation report as authority for the action. The only additional authority cited for the new action was "Sec. 301, P.L. 346" which is merely the provision for review procedure, 58 STAT. 286 (1944), 38 U.S.C. § 693 (h). Thus the only basis for appellant's discharge remains Defense Directive 5210.9.

Party; that his step-mother had registered with the American Labor Party for about ten years; and that he associated with Communists or Communist sympathizers.[3] In his written reply of March 11, 1954, appellant admitted summer employment by the camp as a kitchen-helper and assistant breakfast cook and by the Urban League as a counselor in its camp for under-privileged negro children. Concerning registration with the American Labor Party, [fol. 140] he had admitted it when first interrogated in May 1953,[4] and now added only that, since it was a legally recognized political party, he felt he could properly vote for it. Similarly, he had earlier admitted soliciting funds for the defense of two Smith Act indictees, and now merely added that he felt he had a right to do so. He denied that he was or had ever been a member of the Communist Party, but said that it was possible that he had known or been acquainted with Communists or sympathizers. The allegations concerning his parents he refused to reply to, as he had at his earlier interrogation. The District Court noted in its opinion that "Save for plaintiff's continuing association with his parents and for writing one

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[3] On May 7, 1953, the Army, without revealing this derogatory information to appellant, used it as the basis for interrogating him. On that occasion appellant denied that he was or had ever been a Communist or a member of any subversive organization, gave some details concerning persons about whom he was asked, described the circumstances under which he solicited funds for the defense of the Smith Act defendants, and gave sundry other information. With respect to a number of questions, appellant invoked his privilege under the Fifth Amendment and under Article 31 of the Uniform Code of Military Justice, 64 STAT. 118, 50 U.S.C. § 602, against self-incrimination. He later explained that he had invoked his privilege as a result of fear and apprehension growing out of the circumstances of the interrogation and the fact that he was without counsel. The questions as to which he had invoked the privilege were put to him again in the February 9, 1954, order and he answered all of them, except those relating to his parents. As to those, his refusal was based not on privilege, but rather on "moral indignity [*sic*]," "filial piety," and the assertion that they were irrelevant.

[4] *Supra* note 3.

letter requesting contribution for the legal defense of two persons indicted under the Smith Act, all charges against plaintiff were based on conduct antedating his induction into the Army." [5]

In his complaint, appellant alleged that his character and efficiency ratings had been "excellent." In his first answer, filed July 19, 1955, appellee admitted this allegation. On November 29, 1955, however, by amended answer, he pointed out that for about a week in July 1953 and for the period after April 24, 1954 (shortly before his discharge was ordered) appellant's rating was recorded as "unknown." But, under Army regulations, "ratings of 'unknown' and ratings for periods of less than two months are not 'disqualifying.'" [6]

Appellant also alleged that he was not and had never been a member of the Communist Party, or any Communist organization, or any organization advocating overthrow of the government or advocating or approving violence in denying others constitutional rights, or any [fol. 141] organization seeking to alter our form of government by unconstitutional means, or any organization which, so far as he knew, had ever engaged in subversive activities. He also alleged that he was and always had been "completely and unswervingly loyal to the Government of the United States" and that he "would not hesitate to lay down his life in defense of the United States against any and all of its enemies whomsoever." Appellee denied these allegations, not on the ground that he believed them to be untrue but because of "lack of knowledge and information sufficient to form a belief" concerning them.

Appellee's first contention is that we should not even reach the question whether the District Court correctly declined jurisdiction. He informs us that, after this appeal was filed, the Adjutant General notified appellant that the character of his discharge had been upgraded from "undesirable" to "General (under honorable conditions)" and he asserts that there is, therefore, no longer

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[5] *Harmon* v. *Brucker*, 137 F.Supp. 475, 476 (D.D.C. 1956).

[6] AR 615-360, par. 8b.

a judicially cognizable case or controversy.[7] This new form of discharge, however, is not the legal equivalent of the honorable discharge which appellant sought.

It may well be, as appellee states, that none of the benefits available to discharged soldiers under federal law are withdrawn from the holder of such a "general" discharge as this. Many benefits are conferred, however, by the statutes of the State of New York, where appellant resides, and those statutes all use the language "honorable discharge" or "honorably discharged." Although the New York courts have not decided whether this excludes holders of a discharge entitled "General (under honorable conditions)," the late Judge Frank of the Court of Appeals for [fol. 142] the Second Circuit suggested that it would.[8] But whatever may be said of the technical legal equivalence or difference between the two types of discharge, from a real-life point of view they are vastly different. The portion of our population holding honorable discharge certificates from the armed services is now so great that an adverse reflection is inherent in a certificate which is other than "honorable."[9] This is, of course, confirmed by

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[7] The majority expresses no specific opinion as to this contention. It would seem, however, since the majority proceeds to deal with the question of the District Court's jurisdiction, that it rejected the contention that there is no longer a judicially cognizable case or controversy.

[8] "Although a General Discharge (Under Honorable Conditions) apparently entitles a veteran to most, if not all, benefits under federal law, the statutes of New York, of which plaintiff is a resident, requires [*sic*] that a veteran have an Honorable Discharge in order to be eligible for various benefits under state law. See e.g. New York Military Law Sections 245, 250; New York General Municipal Law Section 148; New York Education Law Section 609; New York General Business Law Section 32." *Schustack* v. *Herren*, 234 F.2d 134, 135 n.2 (2d Cir. 1956).

[9] What the Supreme Court said in *Wieman* v. *Updegraff*, 344 U.S. 183, 190-91 (1952), concerning the discharge of an employee on disloyalty grounds is, we think, not inapplicable here:

> There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty

the statement of appellee's counsel in oral argument that "every soldier gets an honorable discharge unless there is some blemish on his record on account of which he receives a discharge other than honorable."

Nor is the new form of discharge defensible on the ground that the separation report does not on its face indicate that it was based on security considerations. The same observation could be made concerning the "undesirable" discharge. In both instances, however, a person [fol. 143] sufficiently interested to check army regulations would discover the "security" character of the discharge. In the case of the "undesirable" discharge, the only reference to security was the citation of the "disloyal or subversive" regulation, AR 615-370, as the "Reason and Authority for Separation." The separation report accompanying the "General" discharge recited that "Para. 10, AR 615-120 applies." This regulation was cited, according to appellee, "to inform recruiting officers that appellant is ineligible for enlistment in the Regular Army." [10] As anyone may discover, this is a reference to AR 604-10, paragraph 15d, which provides:

> No applicant will be appointed or enlisted without the specific approval of the Secretary of the Army if his separation from previous service indicates that he was relieved from active duty or discharged either as a security risk or for reasons other than security while undergoing investigation under the provisions of these regulations or of corresponding security

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grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when "each man begins to eye his neighbor as a possible enemy."

[10] Compare, in this connection, *Bailey* v. *Richardson*, 86 U.S. App.D.C. 248, 257-58, 182 F.2d 46, 55-56 (1950), *affirmed by an equally divided Court*, 341 U.S. 918 (1951), in which in sustaining the validity of the Government's civilian employee loyalty program, we pointed out that "mere dismissal from the Government service" is not punishment in the sense that permanent proscription from Government service had been held to be in *United States* v. *Lovett*, 328 U.S. 303, 316 (1946).

regulations issued by the other miltary departments. AR 615-120 applies with respect to former members of the armed services seeking enlistment or reenlistment in the Army.

See also Defense Department Directive 5210.9, par. II.

Our jurisdiction to entertain the appeal being unimpaired, the next question to consider is the District Court's ruling that, under our decision in *Gentila* v. *Pace*, 90 U.S.App.D.C. 75, 193 F.2d 924 (1951), it was "constrained" to disclaim jurisdiction of the cause.

"Stripped of self-contradiction and legal conclusions [fol. 144] all that [Gentila's] complaint allege[d]" was that his dishonorable discharge for desertion rested upon "an erroneous finding of fact" that he was mentally capable of forming an intent to desert. We held that "merely erroneous findings of fact by the Discharge Review Board shall not be revised by a court." 90 U.S.App.D.C. at 77, 193 F.2d at 927. Although the District Court recognized that the instant case involved questions of law, it nevertheless thought *Gentila* controlling on the ground that both cases also involve "a review of the findings upon which the separation was based . . . ." *Harmon* v. *Brucker*, 137 F.Supp. 475, 477 (D.D.C. 1956). In this the District Court was wrong. The "findings upon which the separation [in the present case] was based" are not challenged at all. Indeed, as the majority opinion points out, appellant does not challenge the appellee's power to remove him from the Army on mere suspicion that he is a security risk.[11] But, whether or not the interests of national security justify dismissing a soldier on mere suspicion, appellant claims that those interests are not served by branding such a soldier as a security risk as

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[11] Cf. *Bailey* v. *Richardson*, *supra* note 10, 86 U.S.App.D.C. at 263, 182 F.2d at 61: "The Constitution does not require the President to continue to use in the training of Government personnel, the work performed by this appellant, a person whose loyalty to the Government he suspects. There is no reason in the Constitution why the President should not limit the training staff to persons whose loyalty is beyond the faintest shadow of suspicion."

he passes through the gate.[12] The issue he raises is one [fol. 145] of law: whether appellee may withhold an honorable discharge from a soldier whose conduct and efficiency ratings have never been less than "excellent," even assuming the correctness of all of the information appellee relies upon. That claim being "wholly dependent upon a question of law," it is within the jurisdiction of the District Court. *United States* v. *Williams*, 278 U.S. 255, 257-58 (1929); NOTE, 70 HARV. L. REV. 533, 539-40 (1957). Nothing in *Gentila* v. *Pace, supra,* is to the contrary. Nor can I accept it as settled (either by this court or the Supreme Court) that courts may not in circumstances like these review the issuance of a less than honorable discharge. As was pointed out in *Schustack* v. *Herren*, 234 F.2d 134, 135 n. 1 (2d Cir. 1956), "The Supreme Court has not yet spoken on the question of 'whether and to what extent the courts have power to review or control the War Department's action in fixing the type of discharge certificates issued to soldiers [footnote omitted] . . . .' Patterson v. Lamb, 329 U.S. 539, 542, 67 S.Ct. 448, 449, 91 L.Ed. 485." In the footnote, the Supreme Court referred, among other authorities, to the decision of this court in *Denby* v. *Berry*, 51 App.D.C. 335, 279 Fed. 317 (1922), *reversed on other grounds*, 263 U.S. 29 (1923). In that case we held "void and without authority of law" what we thought to be a discharge which did not comport with statutory procedure.[13] See also *Davis* v. *Woodring*, 72 U.S.App.D.C. 83, 85, 111 F.2d 523, 525 (1940).

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[12] Even in the case of a civilian Government employee who sought the position he holds, rather than being drafted, although we said that "mere dismissal" is not punishment and that there is no redress for injury suffered "in the process of dismissal," we recognized no authority to inflict gratuitous injury over and above the dismissal. *Bailey* v. *Richardson, supra* note 10, 86 U.S.App.D.C. at 257-58, 265, 182 F.2d at 55-56, 63.

[13] Our decision was reversed by the Supreme Court upon the ground that what we considered a discharge was actually merely a transfer from active to inactive status, something wholly within the discretion of the commander-in-chief.

That appellant seeks, in addition to a declaration that the discharge given him was void, an order that he be given an honorable discharge does not, in my view, deprive the District Court of jurisdiction. If, upon review, [fol. 146] the discharge given appellant is declared to be void, we must assume that the Secretary would issue a discharge which is not void. *Denby* v. *Berry, supra.* Moreover, if the District Court finds the denial of an honorable discharge to rest on legally insufficient grounds, it may, at least, enjoin a denial for such reasons. *Perkins* v. *Elg*, 307 U.S. 325, 349-50 (1939); *Shachtman* v. *Dulles*, 96 U.S.App.D.C. 287, 294, 225 F.2d 938, 940 (1955).

Both parties request that we decide the merits of this controversy—namely, whether the Universal Military Training and Service Act of 1948, 62 STAT. 606, 50 U.S.C. App. § 454(b),[14] pursuant to which Directive 5210.9 was promulgated, authorizes issuance of less than an "honorable discharge" certificate, in the circumstances of this case. But I think that since the District Court never reached consideration of the merits, sound judicial practice requires that it should first have that opportunity.

[14] The statute sets the draftee's term of service at two years, "unless sooner released, transferred, or discharged in accordance with procedures prescribed by the Secretary of Defense . . ."

[fol. 147] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1957.

C. A. 1972-55

No. 13,230

JOHN H. HARMON, III, Appellant,

v.

WILBER M. BRUCKER, Individually and as Secretary of the Department of the Army, Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: Prettyman, Bazelon and Danaher, Circuit Judges.

JUDGMENT—Jan. 31, 1957

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: January 31, 1957.

Per Circuit Judge Prettyman.

Separate dissenting opinion by Circuit Judge Bazelon.

[fol. 148] DESIGNATION OF RECORD (omitted in printing)

[fol. 150] Clerk's Certificate to Foregoing Transcript (omitted in printing)

[fol. 151] Supreme Court of the United States

[Title omitted]

Order Allowing Certiorari—May 13, 1957

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT. U S

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 141

HOWARD D. ABRAMOWITZ, PETITIONER,

vs.

WILBUR M. BRUCKER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MAY 27, 1957
CERTIORARI GRANTED JUNE 17, 1957

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,587

HOWARD D. ABRAMOWITZ, *Appellant*

v.

WILBUR M. BRUCKER, Secretary of the Department of the Army, *Appellee*

Appeal from the United States District Court for the District of Columbia

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JOINT APPENDIX

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1 Filed May 21, 1956

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2140-'56

HOWARD D. ABRAMOWITZ, 334 East 92nd Street, Brooklyn 10, New York, *Plaintiff*,

v.

WILBER M. BRUCKER, Secretary of the Department of the Army, Washington 25, D. C., *Defendant*.

Complaint for Declaratory Judgment and Injunctive Relief

Plaintiff, complaining of the defendant, by his attorneys, respectfully alleges:

1. The Court has jurisdiction of this action under D. C. Code Sections 11-305 and 11-306, under Section 10 of the Administrative Procedure Act, 5 U. S. C. 1009, and under 28 U. S. C., 1331 and 2201.

2. The defendant is the Secretary of the Department of the Army of the United States and is sued herein in that capacity.

3. Plaintiff is a citizen of the United States and is a resident of Brooklyn, New York.

4. On October 15, 1951 plaintiff was duly inducted into the Armed Forces of the United States Army, under and pursuant to the provisions of the Universal Military Training and Service Act of 1948, 50 App. U. S. C. 451 et seq.

5. On June 30, 1953, the plaintiff, having honorably completed his active military service, received a certificate

of honorable separation from the active military forces and was, pursuant to the aforementioned Act, duly transferred to the Enlisted Reserve.

2 6. On July 15, 1955, plaintiff received a communication from the Department of the Army, Office of the Adjutant General, copy of which is annexed hereto as Exhibit A. Enclosed therewith was a document entitled "Summary of Information", a copy of which is annexed hereto as Exhibit B.

7. Thereafter and on August 22, 1955, plaintiff pursuant to the applicable rules and in accordance with permission granted to him in paragraph 2(b) of Exhibit A, submitted a letter of rebuttal, a copy of which is annexed hereto as Exhibit C.

8. Thereafter and on or about September 13, 1955 plaintiff received an undesirable discharge from the Armed Forces of the United States. A copy of his discharge certificate is annexed hereto as Exhibit D.

9. Thereafter and on or about October 19, 1955 plaintiff filed with the Army Discharge Review Board an application for review of his said discharge. On May 9, 1956, plaintiff received from the Department of the Army a letter denying his request for a change in type of discharge. A copy of that letter is annexed as Exhibit E.

10. The allegations in the aforesaid letter dated July 15, 1955, Exhibit A hereto, relate solely to the lawful activities and associations of plaintiff prior to the time of his induction into the Armed Forces of the United States, during a period of time when the defendant had no jurisdiction or control over him.

11. The action of the defendant in ordering the plaintiff discharged from the Army of the United States with a

discharge less than honorable and plaintiff's discharge from the Army with an undesirable discharge was arbitrary and capricious, in violation of the statutes of the United States and further in violation of the First and Fifth Amendments to the Constitution of the United States, in that said discharge deprived plaintiff of his rights of free speech and assembly under the Constitution and deprived him of liberty and property without due process of law.

12. By reason of the said undesirable discharge, plaintiff has been and will continue to be deprived of substantial monetary benefits and rights as a veteran under both Federal and State legislation and plaintiff has encountered and will continue to encounter substantial prejudice in civilian life where the type of service rendered in the Armed Forces of the United States, or the character of discharge received therefrom, has any bearing.

13. The character and efficiency of plaintiff's active service in the Army of the United States and of his service in the enlisted reserves was such as would entitle him to an Honorable Discharge.

14. Plaintiff has exhausted all of the administrative remedies he is required to exhaust and has no adequate remedy at law.

WHEREFORE, plaintiff prays the following:

1. That the action of the defendant in discharging plaintiff from the enlisted reserves of the United States with an undesirable discharge on September 13, 1955 be declared null and void;

2. That the defendant be directed to rescind plaintiff's undesirable discharge and change his discharge to an Honorable Discharge as of September 13, 1955, and for

such other and further relief as to this Court may seem just and proper in the premises.

/s/ VICTOR RABINOWITZ
Victor Rabinowitz
RABINOWITZ & BOUDIN
25 Board Street
New York 4, N.Y.

/s/ DAVID REIN
David Rein
FORER & REIN
711 Fourteenth Street, N.W.
Washington, D. C.
Attorneys for Plaintiff.

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4 Filed May 21, 1956

EXHIBIT A

FOR OFFICIAL USE ONLY

DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL
WASHINGTON 25, D. C.

15 July 1955

In Reply Refer to
AGPR-F 201 Abramowitz, Howard D.
ER 51 137 600 (15 Jul 55)

Subject: Allegations

Thru: Commanding General, First Army

To: Pfc Howard D. Abramowitz, ER 51 137 600
603 Willims Avenue
Brooklyn, New York

1. Information has been received in this office which furnishes reason to believe that your retention in the Army Establishment may not be clearly consistent with the

interests of the national security. This information is to the effect that:

a. During 1948 and 1949, you were a member of the Communist Party, an organization cited by the Attorney General of the United States in 1948 as subversive.

b. From 1949 to 1951, you were a member of the Labor Youth League, an organization cited by the Attorney General of the United States in 1950 as a Communist front.

c. From 1946 to 1948, you were a member of the American Youth for Democracy, an organization cited by the Attorney General of the United States in 1947 and 1948 as subversive and Communist.

d. In 1950 you were a subscriber to the "Worker", the Sunday edition of the "Daily Worker", a publication cited as "the chief journalistic mouthpiece of the Communist Party" by the Special Committee on Un-American Activities.

2. You are advised that you have the following choices and may elect one or more of the following actions:

a. Request, within 5 days from date of receipt, a personal appearance hearing before a "Field Board" with or without counsel. You will be furnished military counsel and may selected such counsel, if the individual is reasonably available. Civil counsel will be at your own expense. The "Field Board" will assist you in procuring witnesses who are reasonably available but you will not be entitled to reimbursement for expenses incurred incident to their appearance.

b. Rebut this letter in writing within 15 days from date of receipt, to include such documents as you desire to submit. You are advised that your failure to request a hearing before a "Field Board" may result in action under current regulations (SR 600-220-1), to effect your

discharge, with type of discharge to be determined by the Department of the Army.

5 c. Request retirement, if eligible, or elect discharge within 5 days from date of receipt of this letter. Should you elect discharge, the attached letter, inclosure 1, should be signed in the presence of an Officer of the Judge Advocate General's Corps, whose name and address will be furnished by the Chief of your Military District upon your request.

3. The Summary of Information, attached hereto, is furnished for your information and is marked "FOR OFFICIAL USE ONLY" solely for your protection. This notation in no way limits your use of this document but is intended to insure that the contents thereof are not unnecessarily divulged without your consent.

4. SR 600-220-1 sets forth complete procedure governing the processing of your case.

5. One of the actions indicated in paragraph 2 must be indicated in writing by you. Your reply will be made to the Chief, New York Military District.

BY ORDER OF THE SECRETARY OF THE ARMY:

Adjutant General

3 Incl.

1. Sample ltr, request for discharge from USAR
2. SR 600-220-1, w/Changes 1 & 2
3. Summary of Information

9 Filed May 21, 1956

EXHIBIT C

334 East 92nd Street
Brooklyn 12, New York

August 22nd, 1955

Recorder
First Army Field Board of Inquiry
Headquarters Fort Jay
Governors Island
New York 4, New York

Re: AGPR-F 201 Abramowitz, Howard D.
ER 51 137 600 (15 Jul 55)

Dear Sir:

Kindly be advised that I hereby elect, under Section 29 (c)(1) of SR 600-220-1, to submit this letter of rebuttal in lieu of appearance before a board, to wit, the hearing you have heretofore set herein for August 30, 1955.

I respectfully request that you kindly acknowledge, on or before August 26th, 1955, your receipt and acceptance of this letter of rebuttal in lieu of said hearing. In the event of your acknowledgment to such effect, a hearing will not be necessary.

I hereby set forth the following as and for my letter of rebuttal:

1. Respondent, Howard D. Abramowitz, honorably completed his active military service from October 15, 1951 to June 30, 1953, in recognition of which honorably completed active military service he duly obtained an honorable separation and was duly transferred to the Enlisted Reserve on June 30, 1953.

The letter of Allegations dated July 15, 1955 contains no allegations relating in any manner whatsoever to either

the period of respondent's active military service or the period since his honorable separation therefrom and his transfer to the Enlisted Reserve. Rather, the Letter of Allegations sets forth allegations which relate solely to dates and periods of time which antedate the commencement of respondent's active military service.

Thus, paragraph 1(a) of the Letter of Allegations specifies "During 1948 and 1949 . . ."; paragraph 1(b) thereof specifies "From 1949 to 1951 . . ."; paragraph 1(c) thereof specifies "From 1946 to 1948 . . ."; paragraph 1(d) thereof specifies "In 1950 . . .".

It is hereby submitted that, in view of the foregoing, the Letter of Allegations sets forth allegations which, on their face, are wholly irrelevant, immaterial and incompetent and have no bearing whatsoever upon respondent's lawful right to retain his present duly earned status as a member of the Enlisted Reserve.

2. The allegations set forth in the Letter of Allegations relate wholly to alleged personal and political beliefs and associations allegedly had by respondent prior to his active military service and prior to his honorable separation therefrom and his transfer to the Enlisted Reserve.

10 Said allegations of said alleged personal and political beliefs and associations on the part of respondent do not constitute lawful and proper grounds for the above proceeding seeking to deprive respondent of his duly earned present status as a member of the Enlisted Reserve. This proceeding, based on said allegations in the Letter of Allegations, constitutes unlawful, illegal and unconstitutional infringement upon, and deprivation and denial of, the rights guaranteed to respondent under the Constitution of the United States, and more particularly the First Amendment thereof.

WHEREFORE, respondent respectfully prays that he be retained in the Army Establishment as a member of the Enlisted Reserve.

.....

HOWARD D. ABRAMOWITZ

---

12 EXHIBIT D

SEAL

UNDESIRABLE DISCHARGE

From the ARMED FORCES of the
UNITED STATES OF AMERICA

THIS IS TO CERTIFY THAT Pvt Howard David Abramowitz, ER 51 137 600, ARTY, USAR, Ready Reserve, who was inducted 15 October 1951, relieved from active military service and transferred to the Army Reserve 30 June 1953 was Discharged from the Army of the United States on the 13th day of September 1955 as Undesirable

AR 604-10 applies

E. J. DELANEY
E. J. Delaney
Major, Adjutant General's Corps

13 Filed May 21, 1956

EXHIBIT E

DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL
ARMY RECORDS CENTER
St. Louis 14, Missouri

AGAR-SR-201 Abramowitz, Howard D.
ER 51 137 600 (13 Apr 56)

9 May 1956

Mr. Howard D. Abramowitz
334 East 92nd Street
Brooklyn 12, New York

Dear Mr. Abramowitz:

In connection with your application, the Army Discharge Review Board, established under the authority of Section 301, Public Law 346, 78th Congress, approved 22 June 1944, has reviewed the type and nature of your separation from the service.

After a careful review of the entire case, the Secretary of the Army has directed that your request for a change in type or nature of separation be not favorably considered.

Sincerely yours,

DAVID H. ARP
David H. Arp
Colonel, AGC
Commanding

Copy furnished:
Mr. Victor Rabinowitz
Rabinowitz & Boudin
25 Broad Street
New York 4, New York

14 Filed June 11, 1956

Plaintiff's Motion for Summary Judgment

Now comes the plaintiff by his attorneys, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, move the Court to enter summary judgment for the plaintiff on the ground that there is no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter of law. In support of this motion plaintiff refers to the entire record herein, including the pleadings and the affidavit submitted herewith.

/s/ David Rein
David Rein

/s/ Victor Rabinowitz
Victor Rabinowitz
Attorneys for Plaintiff

---

15 Filed June 11, 1956

State of New York
City of New York
County of New York } ss.:

Howard D. Abramowitz, being duly sworn, deposes and says: I am the plaintiff in this matter. I make this affidavit in support of a motion for summary judgment.

The basic facts on which this motion is made appear in the complaint and this affidavit is merely supplementary to that complaint. As will appear, all of the matters to which reference is made are matters of record and there is no dispute with respect to any of the facts on which I rely for the relief requested in the complaint.

I am a citizen of the United States, having been born in the State of New Jersey on June 18, 1930. I was in-

ducted into the United States Army on October 15, 1951. I received my basic training at Camp Chaffee, Arkansas.

Early in 1952 I was shipped to the Far East and saw active service on the Eastern and East Central fronts in Korea from May 1952 to May 1953. During that period of time I was assigned to a field artillery unit and during part of that time, functioned as a crew chief. I received a Korean Service Medal with three service stars and a United Nations Service Medal for my service under fire.

16 Although I was originally inducted for a period of two years, the policy of the Army at the time was to separate Korean veterans from active service prior to the expiration of the two year period where possible. Accordingly I received an honorable separation from active service on June 30, 1953. Prior to this date no questions whatsoever had been raised with respect to my loyalty nor had it been suggested by anyone that I was in any respect at all a security risk.

Since my army service I have resumed my schooling and am now attending Brooklyn College. I expect to graduate with a Bachelor of Arts Degree in January 1957. I am majoring in psychology and it is my hope that I will be able to become a professional psychologist. Ultimately after some amount of practical experience in the field I would hope to teach. Most of the employment opportunities for psychologists are with government agencies. Most school systems in New York State now employ psychologists in connection with guidance and child welfare work. Most city, state and federal hospitals have psychologists on their staff. Substantially all state and city educational institutions teach courses in psychology. Many courts in the state have staff psychologists, particularly in criminal courts, domestic relations courts and children's courts.

It is in this area that my greatest opportunity for employment will lie. There are of course many private

institutions which likewise employ psychologists, but basically most of the work carried on in this field is carried on in institutions supported either in whole or in part by public funds.

It will be impossible for me to secure employment in any government supported institution and almost
17 impossible to secure employment in a private institution so long as my army records show that I received an undesirable discharge from the United States Army. Almost all application blanks both private and public as a matter of course contain questions concerning the applicant's military service. As a practical matter, pursuit of my chosen profession will be impossible so long as the present stigma attaches to my name.

There are of course many disabilities of an important financial nature which attach to anyone who secures an undesirable discharge from the United States Army.

I am advised that these matters will be discussed by counsel.

In addition, veterans with honorable discharges are entitled to many benefits under the laws of New York State which are not available to veterans with either a general or an undesirable discharge.

WHEREFORE, plaintiff respectfully requests that summary judgment be granted for the relief demanded in the complaint.

/s/ HOWARD D. ABRAMOWITZ

Sworn to before me this
5th day of June, 1956.
/s/ LUBA ARONOFF
Luba Aronoff
Notary Public, State of New York
No. 31-5107825
Qualified in New York County
Commission Expires March 30, 1958

18 Filed June 27, 1956

Answer

1. Defendant denies the allegations of paragraph one of the complaint.

2. Defendant admits the allegations of paragraph two of the complaint.

3. Defendant admits the allegations of paragraph three of the complaint.

4. Defendant admits the allegations of paragraph four of the complaint.

5. Defendant admits that on June 30, 1953 plaintiff received a certificate of honorable separation from active duty and that he was transferred, as the law provides, to the Enlisted Reserve. Except as admitted herein, the allegations of paragraph five of the complaint are denied.

6. Defendant admits the allegations of paragraph six of the complaint.

7. Defendant admits the allegations of paragraph seven of the complaint.

8. Defendant admits the allegations of paragraph eight of the complaint.

9. Defendant admits the allegations of paragraph nine of the complaint.

10. Defendant denies the allegations of paragraph ten of the complaint and alleges that the letter of July 15, 1955 attached to the complaint as Exhibit A speaks
19 for itself, and the Court is respectfully referred to it for the full meaning and purport thereof.

11. Defendant denies the allegations of paragraph eleven of the complaint.

12. Defendant denies that plaintiff has been or will be denied monetary benefits as a veteran under Federal legis-

lation by reason of his discharge from the Enlisted Reserve, and denies for lack of knowledge or information sufficient to form a belief the remaining allegations of paragraph twelve of the complaint.

13. Defendant denies the allegations of paragraph thirteen of the complaint.

14. Defendant denies the allegations of paragraph fourteen of the complaint.

Additional Defenses

First Defense

The Court does not have jurisdiction over the subject matter of this action.

Second Defense

Plaintiff has failed to exhaust the administrative remedies available to him.

Third Defense

The complaint fails to state a cause of action upon which the relief sought may be granted.

---

21 Filed July 12, 1956

Motion by Defendant for Summary Judgment

Defendant respectfully moves the Court for summary judgment on the ground that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law.

In support of this motion the Court is respectfully referred to the affidavits and exhibits which are attached hereto, and to defendant's accompanying memorandum of points and authorities in support of this motion and in opposition to plaintiff's motion for summary judgment.

38 Filed July 12, 1956

Affidavit

Department of the Army
The Pentagon
Washington 25, D. C.

A. L. Hougland, Lieutenant Colonel, United States Army, being duly sworn deposes and says:

I am the Recorder of the Army Security Review Board, Department of the Army, Washington 25, D. C., established under the provisions of General Orders No. 60, Department of the Army, dated 14 October 1955 and Army Regulations 604-10, dated 29 July 1955, as amended by Change 2, dated 12 June 1956. In this capacity I have access to the records of the Army Security Review Board. Examination of these records shows that the Army Security Review Board reviewed and considered the case of Howard D. Abramowitz on 9 September 1955 under the provisions of Army Regulations 604-10 and recommended that Howard D. Abramowitz be discharged from the United States Army with an Undesirable Discharge. At the time his case was considered, Howard D. Abramowitz was a member of a reserve component and the Army Security Review Board made its recommendation to discharge him under conditions other than honorable upon its findings as a board of officers convened by competent authority within the meaning of Section 249, Armed Forces Reserve Act of 1952; 66 Stat. 495.

This recommendation was forwarded to the Secretary of the Army who acted finally upon the case on 13 September 1955 with approval of the recommendation of the board with direction that Howard D. Abramowitz be discharged with an Undesirable Discharge.

/s/ A. L. Hougland
A. L. Hougland,
Lt. Colonel, GS, USA

COUNTY OF ARLINGTON
STATE OF VIRGINIA } ss:

Subscribed and sworn before me this 10th day of July 1956.

/s/ PETER S. WONDOLOWSKI
Peter S. Wondolowski,
Lt. Colonel, JAGC

Authorized to administer oaths by 50 USC 732

APPLICATION FOR CORRECTION OF MILITARY OR NAVAL RECORD
UNDER THE PROVISIONS OF SECTION 207 OF THE LEGISLATIVE REORGANIZATION ACT OF 1946, AS AMENDED
(See instructions on reverse side before completing application)

REQUEST RECEIVED 20 JUL 54
APPEARED, RECEIVED 20 NOV 54

BRANCH OF SERVICE
☒ ARMY ☐ NAVY ☐ AIR FORCE ☐ MARINE CORPS ☐ COAST GUARD

1. NAME (Last Name - First Name - Middle Initial)	2. RATE, RANK OR GRADE AT TIME OF ALLEGED ERROR OR MILITARY RECORD	3. SERVICE NUMBER
ABRAMOWITZ, Howard D.	PFC	ER 51-137-c00
4. NATURE OF DISCHARGE OR SEPARATION FROM SERVICE (If now on active duty, forward application through channels)	**5. PRESENT STATUS, IF ANY, WITH RESPECT TO THE ARMED SERVICES (Active duty, reserve, retired etc.)**	**6. DATE OF SEPARATION FROM SERVICE**
Undesirable Discharge		June 30,1955
7. ORGANIZATION AT TIME OF ALLEGED ERROR IN RECORD	**8. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. (No expense to the Government)** ☐ YES ☒ NO	**9. I WILL BE REPRESENTED BY COUNSEL (No expense to the Government)** ☒ YES ☐ NO
Reserves		
10. I DESIRE TO HAVE WITNESSES APPEAR IN PERSON IN SUPPORT OF THIS APPLICATION (No expense to the Government) ☐ YES ☒ NO	**11. NAME AND ADDRESS OF COUNSEL (If any)** VICTOR RABINOWITZ 25 Broad Street, New York 4, N.Y.	

12. WITNESSES AND NATURE OF TESTIMONY (Principal facts to which witness will testify)

NAME	ADDRESS	NATURE OF TESTIMONY

13. I REQUEST THE FOLLOWING CORRECTION OF ERROR OR INJUSTICE AND REQUEST PAYMENT OF ANY AMOUNTS FOUND TO BE DUE ON ACCOUNT OF SUCH CORRECTION

My undesirable discharge should be corrected to provide for an honorable discharge

14. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST IN THE FOLLOWING PARTICULARS

SEE RIDER

15. IN SUPPORT OF THIS APPLICATION I SUBMIT AS EVIDENCE THE FOLLOWING

RIDER to Questions 14 and 15

The determination that I be granted an undesirable discharge is in error and unjust because the conclusion reached by the Army is based on alleged activities of mine prior to my induction into the armed forces of the United States.

In the first place, all of these activities were legal and within my rights under the First Amendment to the Constitution. In the second place, the Army has no jurisdiction whatsoever over any pre-induction activities I may have engaged in. Even if my conduct were illegal or wrongful in any respect, the Army has no right to punish me for it.

It needs no argument to establish that the undesirable discharge granted me did amount to punishment.

The arguments in support of my position have been more fully stated in communications addressed by my counsel to the Army and by arguments presented by counsel to the Army Discharge Review Board, and this Board is respectfully referred to that record for further presentation of my position.

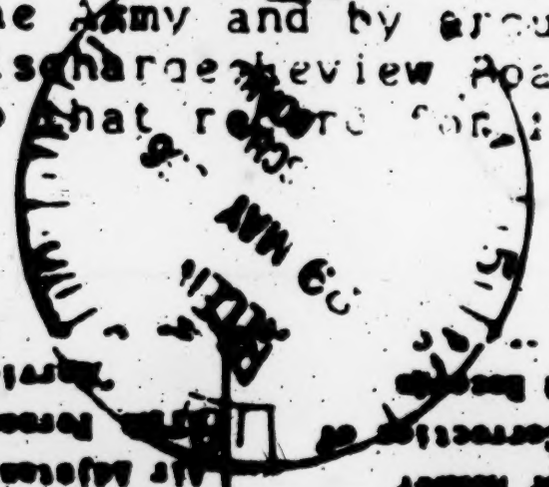
MAIL COMPLETED APPLICATIONS TO APPROPRIATE ADDRESS BELOW

ARMY	NAVY AND MARINE CORPS	COAST GUARD	AIR FORCE
Army Board for Correction of Military Records Department of the Army Washington 25, D.C.	The Secretary of the Navy (Board for Correction of Naval Records) Navy Department	U.S. Coast Guard ATTN: Board Member Board for Correction of Coast Guard Records	Headquarters USAF Air Adjutant General Personnel Records Service Division

...ieral and within my rights under the First ...endment to the Constitution. In the second place, the Army has no jurisdiction whatsoever over any pre-induction activities I may have engaged in. Even if my conduct were illegal or wrongful in any respect, the Army has no right to punish me for it.

It needs no argument to establish that the undesirable discharge granted me did amount to punishment.

The arguments in support of my position have been more fully stated in communications addressed by my counsel to the Army and by arguments presented by counsel to the Army Discharge Review Board, and this Board is respectfully referred to that record for further presentation of my position.



Army Board for Correction of Military Records (Department of the Army Secretary as A.C.)	The Secretary of the Army (Board for Correction of Naval Records) Navy Department	U.S. Coast Guard ATTN: Senior Member Board for Correction of Coast Guard Records	Headquarters USAF Air Adjutant General (Personnel Records Service Division
ARMY	NAVY AND MARINE CORPS	COAST GUARD	AIR FORCE

MAIL COMPLETED APPLICATIONS TO APPROPRIATE ADDRESS BELOW

INSTRUCTIONS

1. FOR DETAILED INFORMATION [illegible] MAY 29 10 12
   Air Force Regulation 31-3
   Army Regulation 15-185
   Coast Guard, Code of Federal Regulations
   Title 14, Part 18
   Navy, NAVEXOS P-108, as revised

2. This form is to be submitted IN DUPLICATE.

3. Complete all items. If the question is not applicable, mark - "None".

4. If space is insufficient, use "Remarks" or attach additional sheet if necessary.

5. Various veterans and service organizations furnish competent counsel without charge.

6. List all attachments or inclosures.

7. ITEMS 8 through 12 - Personal appearance of applicant or his witnesses at hearing or representation by counsel is not required to insure full and fair partial consideration of applications under liberality for hearing. Such appearance and representations are permitted, at no expense to the Government when a hearing is authorized.

8. ITEM 24 - In order to justify correction of a military or naval record, it is necessary for the applicant to show to the satisfaction of the Board, or it must otherwise satisfactorily appear, that the alleged entry or omission is the record was in error or unjust. Evidence may include affidavits or signed testimony of witnesses, executed under oath, and a brief of arguments supporting application. All evidence not already included in your record must be submitted by you. The responsibility for securing new evidence rests with the applicant.

9. ITEMS 9 through 12 - Personal appearance of applicant or his witnesses at hearing or representation by counsel is not required to insure full and fair partial consideration of applications under liberality for hearing. Such appearance and representations are permitted, at no expense to the Government when a hearing is authorized.

10. This form is to be submitted IN DUPLICATE.

11. Complete all items. If the question is not applicable, mark - "None".

12. If space is insufficient, use "Remarks" or attach additional sheet if necessary.

13. Various veterans and service organizations furnish competent counsel without charge.

14. List all attachments or inclosures.

ARMY Board for Correction of Military Records

Q7

42 Filed Sep. 20, 1956

Stipulation

It is hereby stipulated that plaintiff's application to the Army Board for Correction of Military Records has been denied, and that plaintiff was notified of this fact by a letter dated September 7, 1956 from Colonel David H. Arp, a true copy of which is attached to and made part of this stipulation. It is further stipulated that this Stipulation and the attached letter shall be a part of the record in this case.

---

43 Filed Sep. 20, 1956

DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL
ARMY RECORDS CENTER
ST. LOUIS 14, MISSOURI

AGPR-F 201 Abramowitz, Howard D.
ER 51 137 600 (30 Aug 56)

Mr. Howard D. Abramowitz
334 East 92nd Street
Brooklyn 10, New York

Dear Mr. Abramowitz:

I have been requested by the Army Board for Correction of Military Records to make further reply to your request for correction of your Army records.

The administrative procedures established by the Secretary of the Army for the guidance of the Army Board for Correction of Military Records provide that the Board may deny an application where a sufficient basis for a review has not been established.

Following examination and consideration of your Army records, together with such facts as have been presented by you, the Army Board for Correction of Military Records on 1 August 1956 determined that insufficient evidence has

been presented to indicate probable material error or injustice. Accordingly, your application was denied.

You are privileged, at any time, to submit to the Board for consideration new and material evidence not previously considered.

Sincerely yours

DAVID H. ARP
David H. Arp
Colonel, AGC
Commanding

Copy furnished
Mr. Victor Rabinowitz
Attorney at Law
25 Broad Street
New York 4, New York

---

44 Filed Oct. 9, 1956

Order

This cause having been heard on cross motions for summary judgment, and it appearing that plaintiff who was discharged from the Army with an Undesirable Discharge brings this action against the Secretary of the Army to obtain judicial review of the character of the discharge given him, and that this Court lacks authority to review, control, or compel the granting of particular types of discharge certificate.

NOW, THEREFORE, it is hereby ordered that plaintiff's motion for summary judgment be and it hereby is denied; that defendant's motion for summary judgment be and it hereby is granted; and that the complaint be and it hereby is dismissed.

EDWARD M. CURRAN
District Judge

Dated Oct. 9, 1956

[fol. 23] IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13587

HOWARD D. ABRAMOWITZ, Appellant,

v.

WILBER M. BRUCKER, Secretary of the Department of the Army, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OPINION—Decided April 26, 1957

Mr. Victor Rabinowitz, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court with whom Mr. David Rein was on the brief, for appellant.

Assistant Attorney General Doub, Messrs. Oliver Gasch, United States Attorney, Paul A. Sweeney, Donald B. MacGuineas and Howard E. Shapiro, Attorneys, Department of Justice, submitted on the brief for appellee.

Before BAZELON, FAHY and DANAHER, Circuit Judges.

PER CURIAM: We are agreed that *Harmon* v. *Brucker*, —— U.S. App. D.C. ——, —— F. 2d —— (1957), is controlling here. If the question were open, Judge Bazelon would reverse for the reasons stated in his dissent in *Harmon* and Judge Fahy would wish to consider the question anew.

Affirmed.

[fol. 24] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,587

April Term, 1957

C. A. 2140-56

HOWARD D. ABRAMOWITZ, Appellant,

v.

WILBER M. BRUCKER, Secretary of the Department of the Army, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: BAZELON, FAHY and DANAHER, Circuit Judges.

JUDGMENT—April 26, 1957

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel for appellant and submitted on the brief for appellee.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: April 26, 1957.

Per Curiam.

[fol. 26] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 27] SUPREME COURT OF THE UNITED STATES
No. 1032, October Term, 1956

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed June 17, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 777.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

13. I REQUEST THE FOLLOWING CORRECTION OF ERROR OR INJUSTICE AND REQUEST PAYMENT OF ANY AMOUNTS FOUND TO BE DUE ON ACCOUNT OF SUCH CORRECTION

My undesirable discharge should be corrected to provide for an honorable discharge

14. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST IN THE FOLLOWING PARTICULARS

SEE RIDER

15. IN SUPPORT OF THIS APPLICATION I SUBMIT AS EVIDENCE THE FOLLOWING

SEE RIDER

16. APPLICANT MUST SIGN IN THE SPACE PROVIDED. IF THE RECORD IN QUESTION IS THAT OF A PERSON WHO IS DECEASED OR INCOMPETENT, SUBMIT PROOF OF DEATH OR INCOMPETENCY WITH ACCOMPANY APPLICATION. IF APPLICATION IS SIGNED BY SPOUSE, CHILD OR NEXT OF KIN OR LEGAL REPRESENTATIVE, INDICATE RELATIONSHIP OR STATUS IN APPROPRIATE BOX.

(Check which) ☐ SPOUSE ☐ CHILD ☐ NEXT OF KIN ☐ LEGAL REPRESENTATIVE ☐ OTHER (Specify)

17. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILFULLY MAKING A FALSE STATEMENT OR CLAIM. (Sec. 2, Code, Title 18, Sec 287,1948, provides a penalty of not more than $10,000 fine or not more than 5 years imprisonment or both).

18. COMPLETE ADDRESS (Applicant should forward notification of all changes of address)	SERVICE NUMBER (Or any name or title number)
334 East 92nd Street, Brooklyn 10, N.Y.	56-668
19. DATE: May 23, 1956	20. SIGNATURE (Applicant must sign here) [signature]

DD FORM 149

PREVIOUS EDITIONS ARE OBSOLETE.

Encl 1 to Encl 3'

20

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SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
FEB 15 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. [redacted] 80

JOHN HENRY HARMON, III,

Petitioner,

v.

WILBER M. BRUCKER, individually and as Secretary of the Department of the Army,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

DAVID I. SHAPIRO,
350 Fifth Avenue,
New York 1, N. Y.,
Attorney for Petitioner.

DICKSTEIN, SHAPIRO & FRIEDMAN,
350 Fifth Avenue,
New York 1, N. Y.,
of Counsel.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y. 13, BEEKMAN 3-2320

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Watts, "*The Draftee and Internal Security, A Study of the Army Military Personnel Security Program*" (New York, 1955) 16

Supreme Court of the United States

October Term, 1956

No.

JOHN HENRY HARMON, III,

Petitioner,

v.

WILBER M. BRUCKER, individually and as Secretary of the Department of the Army,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

John H. Harmon, III, petitioner herein, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia entered on January 31, 1957, which affirmed the judgment of the District Court for the District of Columbia entered on January 24, 1956, granting respondent's motion for summary judgment and dismissing petitioner's amended complaint.

Opinions Below

The opinions of the Court of Appeals, i.e., the majority opinion of Judge Prettyman and the dissenting opinion of Judge Baselon, have not been officially reported but are set out in Appendix "B", *infra*, pp. 33-57. The opinion of the District Court (J.A.[1] 99-105) is reported at 137 F. Supp. 475.

Jurisdiction

The judgment of the Court of Appeals was entered on January 31, 1957 (R. 77). The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254.

Questions Presented

1. Did the District Court have jurisdiction to review a less than honorable discharge furnished an inducted soldier as a security risk (because of non-criminal, constitutionally-protected conduct, occurring primarily, if not exclusively, prior to induction), and to grant the relief requested by petitioner where the discharge certificate did not accurately reflect the character of petitioner's excellent military record and violated applicable regulations, statutes and constitutional provisions?

2. (a) While Section 4(b) of the Universal Military Training & Service Act may have authorized the Secretary of Defense to remove "security risks" from the Armed Forces, was Department of Defense Directive 5210.9, par. VIII(F)5 (under which petitioner was stigmatized for life with a less than honorable discharge certificate for having engaged in constitutionally-protected and non-criminal con-

[1] The letters "J.A." as used throughout refer to the Joint Appendix as printed for the use of the court below.

duct extraneous to the character of his actual military service) invalidly authorized, *ultra vires* and void?

(b) If not, is Section 4(b) of the Universal Military Training & Service Act, as applied to petitioner, in violation of the First, Fifth and Sixth Amendments to the Constitution of the United States?

3. Petitioner was not found disloyal by respondent, and the character and efficiency of his actual military service up to the time of his discharge were admittedly excellent. His less than honorable discharge as a security risk was based on non-criminal conduct which occurred primarily, if not exclusively, prior to his induction, and was wholly unrelated to the actual character of his miliary service. Moreover, he was given neither a hearing prior to his discharge nor any statement of the reasons why he was declared a security risk, nor any opportunity to confront and cross-examine the witnesses against him. Was the aforesaid action of respondent in furnishing petitioner a less than honorable discharge certificate (which, by reflecting more than a record of military service, brings reproach and dishonor in civilian life and extinguishes petitioner's right to certain valuable state veterans' benefits), in violation of the First, Fifth and Sixth Amendments to the Constitution of the United States?

Constitutional Provisions, Statutory Provisions, and Regulations Involved

The Constitutional provisions involved are the First, Fifth and Sixth Amendments to the Constitution of the United States. The statutes involved are the Act of May 5, 1950, 64 Sat. 145, 10 U. S. C. 652a; Section 4(b) of the Universal Military Training & Service Act, 62 Stat. 606, 50 U. S. C. App. 454(b); the Act of June 22, 1944, 58 Stat. 286, 38 U. S. C. 693h; and the Act of August 2,

1946, 60 Stat. 837, 5 U. S. C. 191a. The Regulations involved are Department of Defense Directive 5210.9, issued April 7, 1954 (set forth in full at pp. 34-45 of the Joint Appendix), Army Regulation 615-375, Paragraph (2)(b), and Army Regulation 615-360, Paragraphs (7) through (9). All Constitutional, statutory and regulatory provisions, except as otherwise noted, are set forth in Appendix "A," *infra*, at pp. 27-32.

Statement of the Case

A. Petitioner

Petitioner, a resident of the State of New York and prospective applicant for admission to the Bar, was duly inducted into the Army on October 31, 1952. Former Private Harmon's induction was accomplished under the provisions of the Universal Military Training & Service Act. 62 Stat. 604, 50 U. S. C. App. 451 *et seq.* (J.A. 2-3, 19).

On May 7, 1953, petitioner was interrogated concerning his beliefs, attitudes, associations and opinions at the Indiantown Gap Military Reservation, Indiantown Gap, Pennsylvania, where he was then stationed (J.A. 91-97). With respect to some of the questions asked by the military authorities, petitioner invoked his privilege against self-incrimination (Uniform Code of Military Justice, Article 31, 64 Stat. 118, 50 U. S. C. 602), but denied membership in the Communist Party.[2]

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[2] On October 22, 1954, petitioner explained his invocation of the privilege against self-incrimination in testifying under oath before the Army Discharge Review Board, as follows:

"Applicant: Well, quite frankly, I was afraid for one reason and, secondly, I did not have the advice of counsel, I was afraid in the sense that when I was first sent up to the Indiantown Gap I was awakened from sleep and introduced to six gentlemen from the Counter Intelligence Corps, and that included the

On February 9, 1954, petitioner was notified by the Adjutant General that he was to reply to certain derogatory information which had been received concerning him, to wit:

Commanding Officer, a stenographer, and a Sergeant-at-Arms, and I was searched and then taken down to G-2 headquarters and there I was questioned by the battery of these gentlemen from the Counter Intelligence Corps. I did not feel that I could truthfully and honestly answer all the questions that were presented to me—when they were thrown at me in such rapid fire. (J.A. 64) * * *

"Member: Mr. Harmon, on the 7th of May, 1953 you were asked certain questions in regard to which have been repeated this morning by your counsel, and at that time you refused to answer those questions, and you tell us this morning you refused based on the fact that you did not have advice of counsel, and you did not know the names of all the organizations that might be listed on the Attorney General's list. * * * I don't see why you had to have advice of counsel to say you did not belong to them.

"Applicant: Well, sir, I will give you an example. When I was interrogated in May of 1953, I mentioned that I was asked questions all at once, and some of the questions ran to this extent. To whom have you given the plans of Indiantown Gap Military Reservation? How long have you been a courier for the Soviet Union or for some of its satellites. My instant reaction was, what is going on here, you know, I hadn't realized that I was such a cloak and dagger personality. I saw that I was afraid, and really being fearful I did not wish to answer these questions for fear I might say something which was not actually the truth (J.A. 71) * * *

"Counsel: Do you think if you had an opportunity to have carefully considered the questions and your answers to the questions, if you had done so in a calm and deliberate atmosphere rather than through fear, do you beleive you would have answered as you did on the investigation report?

"Applicant: I think if I had time to I would have given more or less similar responses that I had given in the file with AGO. (J.A. 84-85) * * *

"Presiding Officer: What were you apprehensive of?

"Applicant: Well, sir, when someone walks in with a group

"That you—

"a. In 1951 and 1952, were employed at Camp Lakeland which was reported to be a Communist operated camp.

"b. In 1949, were employed by the Detroit Urban League which was reported to be a subversive organization.

"c. In 1952, registered to vote in New York City with the American Labor Party. The American Labor Party is cited by the House Committee on Un-American Activities as being under Communist control in New York City.

"d. Solicited contributions of money for the defense of persons under indictment for violation of the Smith Act" (J.A. 3).

The letter also contained derogatory information with respect to petitioner's father and step-mother, who were alleged to have had "subversive" associations, and further stated that petitioner was alleged to have associated with persons who were Communists or Communist sympathizers (J.A. 3-4).

On March 11, 1954, petitioner replied to the letter of allegations, stating that he was not then nor had he ever

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of men, walks into the room here you had just been awakened, as I explained, by my Commanding Officer * * *

"Presiding Officer: Was your Commonding Officer present?

"Applicant: Yes, sir, I don't know how many gentlemen from the CID and a Lieutenant from G-2, a Sergeant with a .45 pistol strapped to his hip, and why someone should come into my room with weapons, I couldn't understand, I was apprehensive.

"Presiding Officer: You were apprehensive for fear they would shoot you?

"Applicant: I can't explain my subconscious reaction at the time.

"Presiding Officer: You were just apprehensive?

"Applicant: That is correct, sir." (J.A. 87)

been a member of the Communist Party, and in answer to the derogatory information with respect to his father and step-mother, petitioner informed the Adjutant General that:

> "It is with deepest moral indignity coupled with a devout sense of filial piety, that I refuse to answer the derogatory statements made under allegations e and f. As neither my father nor step-mother are employed in any capacity by the federal government, I am led to the conclusion that derogatory information concerning them is wholly irrelevant to the case at hand" (J.A. 4-6).

The allegations in the letter of the Adjutant General dated February 9, 1954, related solely to lawful and legal activities and associations which petitioner carried on as part of his civilian life prior to the time of his induction except that (1) petitioner continued his association with his father and step-mother; and (2) in November 1952, he wrote a letter to two friends suggesting that they make financial contribution to assist the defense of two individuals who had been indicted for a violation of the "Smith Act" (J.A. 7-8, 100).

On April 2, 1955, the Adjutant General, by order of the Secretary of the Army, informed petitioner's Commanding Officer that the proposed discharge of petitioner as "disloyal or subversive" under the provisions of Army Regulation 615-370 had not been favorably considered. Instead, petitioner was to be assigned to non-sensitive duty in the lowest pay grade and retained in the Army establishment (J.A. 6-7). At the same time, petitioner was personally informed by the Adjutant General as follows:

> "1. Reference is made to letter from this office dated 9 February 1954.
>
> "2. The allegations in your case and your reply thereto have been reviewed in the Department of the Army. It has been determined that you will be retained in the service in your present grade, that you

will not be promoted and that upon completion of your term of service you will be discharged with a type of discharge appropriate to the character of service you have rendered as of the date you are eligible for separation.

"By Order of the Secretary of the Army"
(J.A. 7, 100.)

However, 55 days later and on May 25, 1954, without notice to petitioner or providing him with a hearing, the Adjutant General, by order of respondent, rescinded the provisions of the previous order and informed petitioner's Commanding Officer that he would be discharged under the provisions of Army Regulation 615-370 and given an "Undesirable Discharge" (J.A. 7, 20). On June 2, 1954, petitioner was separated from the Army of the United States under the provisions of Army Regulation 615-370 at Transfer Point, Camp Pickett, Virginia, with an "Undesirable Discharge Certificate" (J.A. 13, 14).

It is conceded that the character and efficiency of petitioner's service in the Army of the United States from the date of his induction until the date of his discharge was excellent, and petitioner's service record bears two character and efficiency recommendations for excellent service (J.A. 9, 20, 101).[3]

B. Proceedings Subsequent to Discharge

On June 8, 1954, petitioner applied to the Army Discharge Review Board to have the nature of his discharge certificate changed from Undesirable to Honorable. On October 22, 1954, petitioner appeared before the Army Discharge Review Board accompanied by counsel and testified under oath that he had never been a member of the Com-

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[3] * * * * * [I]n its argument [the Government] concede[d] that it has never found [petitioner] either disloyal or loyal." (137 F. Supp. 475, 477.)

munist Party, or of any Communist cell or unit, or of any Communist organization, or of any organization that advocated the overthrow of the government, or of any organization which advocated a policy of approving or advocating the commission of acts of force or violence to deny other persons their rights under the Constitution, or of any organization which seeks to alter the form of government of the United States by un-Constitutional means, or of any organization which, to his knowledge, had engaged in subversive activities of any kind or nature (J.A. 63-68). Petitioner further testified that he was then and had always been completely and unswervingly loyal to the government of the United States and would not hesitate to lay down his life in defense of the United States against any and all of its enemies whomsoever (J.A. 69, 101).

On November 15, 1954, petitioner was informed that his application for a change of his discharge certificate from Undesirable to Honorable had been denied (J.A. 10). Thereupon, petitioner applied to the Army Board for the Correction of Military Records, but on January 27, 1955, his appeal was denied (J.A. 10). On February 1, 1955, petitioner appealed to the Secretary of the Army, but no action was taken, and on May 2, 1955, petitioner commenced suit in the District Court for the District of Columbia.

C. Administrative Proceedings Subsequent to the Filing of Suit

Subsequent to the filing of the complaint, petitioner's counsel was informed by Hugh M. Milton III, Assistant Secretary of the Army, that the Army Board for the Correction of Military Records had been ordered to undertake "a fresh evaluation of the entire case" (J.A. 51-52). On July 7, 1955, petitioner's counsel replied to Mr. Milton's letter and informed him that petitioner had commenced suit, testing the validity of petitioner's "Undesirable Discharge", but nevertheless offered to participate in a hear-

ing before the Army Board for the Correction of Military Records (J.A. 52-53). On July 20, 1955, petitioner's counsel received another letter from Mr. Milton in which he stated that the Executive Secretary for the Army Board for the Correction of Military Records had scheduled a hearing for July 27, 1955, but that the Army could not agree that the discharge certificate was to be based on the character of the soldier's military service (J.A. 54). On July 25, 1955, petitioner's counsel informed Mr. Milton that appellant would not appear before the Army Board for the Correction of Military Records, inasmuch as a hearing before said board "would serve no useful purpose," since the Army and petitioner were in basic disagreement on the law relating to the issuance of discharge certificates (J.A. 55-56). On November 10, 1955, the Assistant Secretary of the Army denied petitioner's application for a correction of his military record (J.A. 57).

D. Court Proceedings

On May 2, 1955, petitioner filed a complaint in the United States District Court for the District of Columbia, praying for a declaratory judgment declaring invalid his "Undesirable Discharge" and for a declaration that the action of respondent was illegal and unconstitutional. An answer was filed on July 19, 1955. Thereafter, an order was entered granting petitioner's motion to amend his complaint by substituting Wilber M. Brucker in place of Robert T. Stevens as defendant in the within action. Defendant Brucker was appointed Secretary of the Army in place of defendant Stevens, who had resigned. It was stipulated by counsel that the answer which was filed was adopted by the substituted defendant.

After filing of the answer, petitioner and respondent cross-moved for summary judgment. On November 28, 1955, respondent was granted leave to amend his answer to allege that, while petitioner's discharge certificate re-

cited that the authority for his discharge was Army Regulation 615-370, petitioner was in fact discharged under the authority of Department of Defense Directive 5210.9, dated April 7, 1954, and that, while respondent admitted that petitioner's service record was marked "excellent" as to character and efficiency for the periods November 12, 1952, to July 24, 1953, and August 2, 1953, to April 24, 1954, the balance of petitioner's service record was marked "Unknown" as to character and efficiency.[4] On January 24, 1956, the District Court below granted respondent's motion for summary judgment on the sole ground that the court had no jurisdiction to review respondent's action (J.A. 105). Jurisdiction of the cause in the District Court was based on Sections 11-305 and 11-306 of the District of Columbia Code, on 28 U. S. C., Sections 1331, 2201 (the Declaratory Judgment Act), 2202 and on 5 U. S. C., Section 1009. Jurisdiction was also based on the First, Fifth and Sixth Amendments to the Constitution and on Articles I and III thereof.

On June 6, 1956, petitioner was notified by respondent that the character of his discharge was changed from "Undesirable" to "General (Under Honorable Conditions)." Thereupon, respondent filed a memorandum in the Court of Appeals suggesting mootness, which was denied by order of the Court of Appeals on August 17, 1956. On January 31, 1957, the Court of Appeals, by a 2-1 vote, affirmed the decision of the District Court, Judge Bazelon dissenting. Appendix "B," *infra*, pp. 33-57.

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[4] However, the "Unknown" ratings are in no way disqualifying. See, AR 615-360, par. 8(b), Appendix "A", *infra*, p. 31.

Reasons for Granting the Writ

The issues presented by this case raise questions of fundamental importance to the Government of the United States, our democratic society, and thousands of young men inducted into the Armed Forces. The decision of the court below permits the Army to stigmatize an inductee as a "security risk" for having engaged, while in civilian life, in constitutionally-protected and non-criminal conduct and associations. Appendix "B," *infra*, p. 43. Inasmuch as Department of Defense Directive 5210.9 affects the discharge certificates of thousands of young Americans inducted into the Armed Forces, and countless others previously released to the inactive reserve, the decision below deprives millions of young Americans (with excellent military records) of honorable discharge certificates, whenever it is asserted in the name of "security" that they are unsuitable for retention in the military establishment.

The issues which this Court is asked to decide arise from Department of Defense Directive 5210.9, establishing the "Military Personnel Security Program" under the authority of Section 4(b) of the Universal Military Training & Service Act, 62 Stat. 606, 50 U. S. C. App. § 454(b). Or, as stated by Judge Bazelon in his dissent below:

> "• • • whether the Universal Military Training & Service Act • • •, 62 Stat. 606, 50 U. S. C. § 454(b), pursuant to which Directive 5210.9 was promulgated, authorizes issuance of less than an 'honorable discharge' certificate, in the circumstances of this case." Appendix "B", *infra*, p. 57.

On the major questions below, the Court of Appeals was divided. Petitioner contends, with Judge Bazelon, that the majority erred. Petitioner's challenge is premised on the fact that since a discharge is a formal, final judgment by the Government on the military record of a soldier, he has a right to an honorable discharge if his military

record merits it, and that in considering the type of discharge certificate to which he is entitled he cannot be held to answer for matters extraneous to that record. As Judge Bazelon makes clear, petitioner does not challenge respondent's power "to remove him from the Army on mere suspicion that he is a security risk. But, whether or not the interests of national security justify dismissing a soldier on mere suspicion, [petitioner] claims that those interests are not served by branding such a soldier as a security risk as he passes through the gate". Appendix "B,", *infra*, p. 55.

I

The court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

(a) The District Court denied petitioner relief solely because the District Judge believed he lacked jurisdiction to review the issuance of petitioner's discharge certificate (137 F. Supp. 475, 478). The majority opinion of Judge Prettyman below and the decision of the District Court were both based on the prior holding of the court below in *Gentila* v. *Pace* (C. A. D. C.), 193 F. 2d 924, cert. den. 342 U. S. 943. However, this very question was left unanswered by this Court in *Patterson* v. *Lamb*, 329 U. S. 539,[5] where Mr. Justice Black stated:

> "Whether and to what extent the courts have power to review or control the Department's action in fixing the type of discharge certificate issued to soldiers is a question we need not here determine." *Id.*, at p. 542.

[5] This was also the view of Judge Youngdahl in the District Court (137 F. Supp. 475, 478, n. 4), Judge Bazelon in the dissent below (Appendix "B", *infra*, p. 56), and the late Judge Frank in *Schustack* v. *Herren* (2 Cir.), 234 F. 2d 134, 135, n. 1.

In 1944, Congress created the Army Discharge Review Board, 58 Stat. 286, 38 U. S. C. 693h. Thereafter, it authorized establishment of the Army Board for the Correction of Military Records. 60 Stat. 837, 5 U. S. C. 191a. These statutes made determinations of the Army Discharge Review Board "final, subject only to review by the Secretary of the Army." 58 Stat. 286, 38 U. S. C. 693h; and determinations of the Army Board for the Correction of Military Records "final and conclusive on all officers of the government except when procured by means of fraud." 60 Stat. 837, 5 U. S. C. 191a. *Gentila* v. *Pace, supra,* involved a "dishonorable discharge" for desertion which the veteran was seeking to have set aside, alleging insanity at the time of desertion. In that case, the court below held that Congress had precluded review of the Army Discharge Review Board's "erroneous findings of fact." *Id.,* 193 F. 2d at p. 927. However, when it is considered that in the instant case the District Court said: "[T]he discharge certificate * * * has tangible and practical consequences in civilian life. To an Honorable discharge accrue property rights, civil rights, and community respect and honor * * * [but] one receiving an adverse discharge certificate must expect to encounter substantial prejudice in civilian life" (137 F. Supp. 475, 478), we think it evident that the action of respondent was reviewable,* and that the majority opinion below is in apparent conflict with the principles enunciated by this Court in *Williams* v. *United States,* 278 U. S. 255, 257-8. *Cf. Sicurella* v. *United States,* 348 U. S. 385, 391; *Gonzales* v. *United States,* 348 U. S. 407.

In petitioner's case, the issue is one of law. Judge Bazelon states the problem clearly:

> "The issue [petitioner] raises is one of law; Whether [respondent] may withhold an honorable discharge

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* See, Comment, *Judicial Review of Army Discharge Procedures,* 9 Stanford L. Rev. 170-182 (Dec., 1956).

> from a soldier whose conduct and efficiency ratings have never been less than 'excellent,' even assuming the correctness of all the information [respondent] relies upon. That claim being 'wholly dependent upon a question of law' it is within the jurisdiction of the District Court • • • Nothing in *Gentila v. Pace, supra,* is to the contrary. *Nor can I accept it as settled (either by this court or the Supreme Court) that courts may not in circumstances like these review the issuance of a less than honorable discharge.*" (Appendix "B," infra, pp. 55-56, emphasis supplied.)

Whether, and to what extent, the courts have power to review the type of discharge certificate issued in the circumstances of this case is an important question of Federal law which has not been, but should be, settled by this Court.

(b) The Universal Military Training & Service Act authorizes the Secretary of Defense to prescribe *procedures* for the various Armed Services, in providing for the discharge of persons inducted under the Universal Military Training & Service Act. 62 Stat. 606, 50 U. S. C. App. 454(b). Congress has also authorized the Secretary of the Army to establish procedures for the discharge of individuals from the Army prior to the expiration of their normal terms of service, 64 Stat. 145, 10 U. S. C. 652a. Purporting to act in accordance with this statutory authority, the Secretary of Defense issued Department of Defense Directive 5210.9 on April 7, 1954. The Directive provides that the standard for retention in the Armed Services shall be that retention shall not be inconsistent with the interests of national security. *Directive, Par. VII(A)* (J.A. 36). The Directive further provides that the character of the separation certificate of the individual not retained *"shall be predicated upon the gravity of the*

reasonably substantiated information in derogation." Directive, Par. VIII(F)5 (J.A. 43, emphasis supplied).

Petitioner concedes that the Directive, to the extent it requires the removal of any soldier from the Army where retention is "not clearly consistent with the interests of national security" is validly authorized. 62 Stat. 606, 50 U. S. C. App. 454(b). But to the extent the Directive requires that the character of the soldier's separation certificate *"shall be predicated upon the gravity of the reasonably substantiated information in derogation,"* petitioner contends that it was not validly authorized, and was *ultra vires*, unconstitutional and void. Stated another way: While Congress may have authorized the Secretary of Defense to remove "security risks" from the Armed Forces. Congress did not, and could not, authorize him or the Secretary of the Army, or anyone else, to stigmatize an inductee for life with a less than honorable discharge by reason of constitutionally-protected pre-induction associations and activities which had nothing to do with the character of the actual military service the soldier performed.[1]

The Universal Military Training & Service Act is based on the policy "that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance wtih a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy." 62 Stat. 604, 50 U. S. C. App. 451(e). Such a "fair and just" system of selection could not in a democratic state include a political test. And it does not, so far as the Selective Service System is concerned. Men are selected quantitatively upon Armed Forces requi-

[1] See, Watts, *"The Draftee and Internal Security,* A Study of the Army Military Personnel Security Program," (New York, 1955), pp. 6-9.

sitions of need in accordance with legal restrictions upon the size of the military establishment. They are selected qualitatively upon just and clearly defined criteria for classification and generally fair provisions for hearing and appeal. But just because the Selective Service System has declared a person eligible for and liable to induction, however, does not mean that he will be inducted. The Army exercises its veto power over the selection at the point of induction and thereafter. The Army reserves the right to reject anyone it sees fit for whatever reason it sees fit. What is pertinent here, however, is not the validity of the political criteria employed by the Army in making such rejections after induction, but the validity of such criteria in stigmatizing a record of military service which, on other than political considerations, warrants an "Honorable Discharge." Cf. *Joint Anti-Fascist Refugee Committe* v. *McGrath*, 341 U. S. 123, 139-140, 160; *Wieman* v. *Updegraff*, 344 U. S. 183, 190-191.

Ordinarily, subject to the exception spelled out in the Department of Defense Directive:

> "An honorable discharge certificate will be furnished when the individual meets the following qualifications:
>
> (1) Has character ratings of at least 'very good.'
>
> (2) Has efficiency rating of at least 'excellent.'
>
> (3) Has not been convicted by a general court-martial.
>
> (4) Has not been convicted more than once by a special court martial." AR 615-360, Par. 8a (Appendix "A", *infra*, at pp. 30-31).

An honorable discharge is a badge of honor, but it is limited to time and place and the particular character of the military service rendered. It is not a certification that a man has not been a rogue in civilian life or that he will

not become one after he is discharged.[8] In 1954, former Secretary of the Army Stevens stated:

> "The traditional policy of the Army has been that the discharge given should reflect the service rendered. In other words, a man whose conduct has been faithful and honest during the time in service would be entitled to separation under honorable conditions, notwithstanding what his conduct may have been prior to entering the service." *Hearings, Senate Armed Services Committee on S. 3096*, 83rd Cong., 2d Sess., March 18, 1954, at p. 75.[9]

Nevertheless, the majority below held that the Army is not required to give an honorable discharge "to an enlisted man when it finds, on the basis of pre-induction activities, that his presence in the armed forces is not consistent with the national security." Appendix "B", *infra*, p. 43. Surely, such a fundamental issue is for this Court to decide.

Whether Section 4(b) of the Universal Military Training & Service Act, pursuant to which Directive 5210.9 was promulgated, authorizes the issuance of a less than honorable discharge certificate to a soldier with ratings of "excellent" (for non-criminal, constitutionally-protected conduct occurring primarily, if not exclusively, prior to induc-

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[8] See, AR 615-375, par. 2(b); AR 615-360, par. 7; 13 Op. Atty. Gen. 16 (1869); 18 Op. Atty. Gen. 427 (1886). In 1918, the Army's Judge Advocate General ruled: "A soldier who was dishonorably discharged in a previous enlistment was inducted in the service during the present emergency and served honestly and faithfully. Under such circumstances he is entitled to an Honorable Discharge at the end of his present service. A bad record in a prior enlistment is immaterial in considering the character of the discharge to be granted from his present enlistment." *Dig. Op., J. A. G.* (1912-1930), Section 271, p. 128, No. 220.89, Nov. 30, 1918.

[9] To our knowledge, the first historical precedent was established by President Lincoln in 1864 in the case of Captain E. W. Andrews. See, Sandburg, *III, "Lincoln" (War Years)*, pp. 294-296.

tion) is an important question of Federal law which has not been, but should be, settled by this Court. Inasmuch as the decision below affects inducted personnel of all the armed services, including inactive reservists, it is of such vital importance as to require this Court to grant certiorari.

(c) The court below held that inasmuch as petitioner conceded that the Army could discharge him on mere suspicion that he was a security risk, "it could include that consideration among the factors to be considered in determining the value of his services, and, consequently, in selecting the type of discharge to be given him." Appendix "B", *infra*, p. 43.[10] Accepting this assertion on its face,

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[10] Respondent's argument, apparently adopted by the majority below, that the Army's concern with "moral and discipline is sufficient justification * * * for its policy of not giving security risks the same award of honorable service given exemplary soldiers" (Appellee's Br. p. 24) is absurd. See, *e.g.*, testimony of Hugh M. Milton II, Assistant Secretary of the Army, *Hearings, Subcommittee on Constitutional Rights, Senate Judiciary Committee, pursuant to S. Res. 94*, 84th Cong., 2d Sess., November 22, 1955, pp. 529-530. The historical facts demonstrate that a man's parents, allegedly "subversive," or his political "state of mind," do not militate against his being an "exemplary soldier." A most cogent example during World War II was the 442nd Regimental Combat Team. This organization, which won a Presidential unit citation for heroism in combat in the European Theatre of Operations, was made up of Nisei, most of whose parents were imprisoned in detention camps during World War II because of suspected "disloyalty." While it may be inconceivable to the Secretary of Defense (See, *Hearings before the Senate Armed Services Committee on S. 3096*, 83rd Cong., 2d Sess., March 18, 1954, p. 44), these realistic "security risks" were given honorable discharges upon their separation from the military service "the same as the millions of fine men that have fought for our Nation and have given loyal service" (*Ibid.*). To say that the members of the 442nd Regimental Combat Team were not "exemplary soldiers" is to mock the graves of Japanese-Americans scattered along the Italian peninsula. To say that a soldier who has served the military with a rating of "excellent" is not an "exemplary soldier" merely because of a supposed undesirable "state of mind" or because his parents are accused of being Communists, is to distort our democratic institutions and the American military tradition.

it is readily apparent that what Judge Prettyman is saying is that if, on the basis of non-criminal acts and associations extraneous to the character of an inductee's military service, the Army can determine that the inductee's "state of mind" during his period of service was not a desirable one, then the Army has the right to visit a less than honorable discharge upon the inductee, whether or not that "state of mind" induced overt or affirmative acts considered derogatory in connection with his military duties. But cf. *American Communications Association* v. *Douds*, 339 U. S. 382, where the late Mr. Justice Jackson said: "[t]hought control is a copyright of totalitarianism and we have no claim to it." *Id.* at p. 442.

We think it clear that the action of respondent in this case violated the First, Fifth and Sixth Amendments to the Constitution. Here, at least in part, the issues are petitioner's right to freedom from government defamation and the manner in which the destruction of his good name and personal honor was accomplished.[11]

Rights to freedom of thought, association and belief cannot be infringed by government action defaming and dishonoring an individual who has exercised them, espe-

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[11] The holding of the court below that petitioner's rights under the Sixth Amendment were not infringed is, we think, unrealistic. We believe that petitioner could not have been given a less than honorabl discharge as a security risk without all the safeguards of a judicial trial, or, in the alternative, the safeguards of a general court-martial under the Uniform Code of Military Justice, 64 Stat. 108, *et seq.*, 50 U. S. C. 551, *et seq.* See, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *United States* v. *Lovett*, 328 U. S. 303; *Cummings* v. *Missouri*, 4 Wall. 277, 321-322. This is especially true in the instant case, since not only are petitioner's job opportunities and reputation seriously impaired, but his right to state veterans' benefits is virtually extinguished. See, *Schustack* v. *Herren* (2 Cir.), 234 F. 2d 134, 135, n. 2; *Horylev* v. *New York State Bonus Commission* (3d Dept.), 220 App. Div. 345, 221 N. Y. Supp. 548.

cially when such action cannot be justified in the national security interest. Cf. *Cole* v. *Young*, 351 U. S. 536. We think that constitutional protection attaches, not to petitioner's separation from the Army establishment, but to the stigmatization of his record of military service (a "badge of infamy"), which, on other than political considerations, warranted an "Honorable Discharge." We think that such action, in no way justifiable in the national security interest, was arbitrary and, thus, a violation of "substantive due process." See, *e.g.*, *American Communications Association* v. *Douds*, 339 U. S. 382, 402; *Wieman* v. *Updegraff*, 344 U. S. 183.

Whether the Universal Military Training and Service Act, as applied to petitioner, violates the First, Fifth and Sixth Amendments to the Constitution is an important quesion of Federal law which has not been, but should be, settled by this Court.

II

The court below has decided Federal questions in a way in conflict with applicable decisions of this Court.

(a) While petitioner demanded relief requiring respondent to issue him an honorable discharge certificate (J.A. 11), he demanded in the first instance that the District Court declare invalid the action denying him an honorable discharge for unconstitutional and illegal reasons (J.A. 11, 25-26). Thus, even if we assume, *arguendo*, that the District Court lacked jurisdiction to interfere with respondent's discretion and compel him to issue petitioner an honorable discharge certificate, we think it had ample jurisdiction to declare invalid respondent's denial of an honorable discharge for such reasons. See, *e.g.*, *Perkins* v. *Elg*, 307 U. S. 325, 349-350. As Judge Bazelon's dissent makes clear:

> "That [petitioner] seeks, in addition to a declaration that the discharge given him was void, an order that

> he be given an honorable discharge does not, in my view, deprive the District Court of jurisdiction. If, upon review, the discharge given [petitioner] is declared to be void, we must assume that the Secretary would issue a discharge which is not void * * *. Moreover, if the District Court finds the denial of an honorable discharge to rest on legally insufficient grounds, it may, at least, enjoin a denial for such reasons." Appendix "B", *infra*, at pp. 56-57.

Moreover, even in those cases ordinarily free from judicial scrutiny, or where Congress has said that administrative action is "final," judicial review may be had where the action challenged is bottomed on an unconstitutional, invalidly authorized, or *ultra vires* administrative regulation. See, *Stark* v. *Wickard*, 321 U. S. 288, 309-310; *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369; *St. Joseph Stockyards* v. *United States*, 298 U. S. 38, 52; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 140, 157. Such is petitioner's contention here.

The District Court recognized that the discharge certificate has tangible and practical consequences in civilian life. "To an Honorable discharge accrue property rights, civil rights, and community respect and honor * * *" (137 F. Supp. 475, 478). See also: *United States ex rel. Roberson* v. *Keating* (D. C. Ill.), 121 F. Supp. 477, 479. Thus, since this Court has said that "the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions," *Sterling* v. *Constantin*, 287 U. S. 378, 401, we think the right to judicial review is clear. *Burns* v. *Wilson*, 346 U. S. 137, 142. See also, the classic statement of this principle by Mr. Justice Brandeis in *St. Joseph Stockyards* v. *United States*, 298 U. S. 38, at p. 77 (concurring).

By reason of the effect of Department of Defense Directive 5210.9 on the lives, liberty and property of millions of American citizens, who, under our statutes, are drafted

into military service, the question of "reviewability" is of paramount significance. The court below has decided this question in a way in conflict with the applicable decisions of this Court.

(b) Petitioner's First Amendment rights were abridged when he was furnished a less than honorable discharge as a security risk. See, *American Communications Association* v. *Douds*, 339 U. S. 382. In that case, Chief Justice Vinson stated:

> "But • • • the fact that no direct restraint or punishment is imposed on speech or assembly does not determine the • • • question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." *Id.*, 339 U. S. at p. 402.

Petitioner's "identifying arm-band" is his less than honorable discharge certificate, worn for life by reason of the exercise of his First Amendment rights. Furthermore, the *Douds* case specifically holds that a limitation on First Amendment guarantees is permissible only when that limitation finds justification in the safety of the community or the safety of the Nation. Cf. *Cole* v. *Young*, 351 U. S. 536. But here, we think there is no justification in the interests of national security for furnishing petitioner a discharge certificate, which instead of reflecting his record of excellent military service, brings him reproach and dishonor in civilian life.[12] See, *e.g.*, *McTer-*

[12] Insofar as the public is concerned, the term "security risk" is synonymous with "traitor," See, *e.g.*, *Hearings, Senate Sub-committee, Committee on Post Office and Civil Service, pursuant to S. Res. 20*, 84th Cong., 1st Sess., June 3, 9, 23, August 30, 31, 1955 at pp. 67, 121-122, 130, 271, 550, 573, 599, 627.

nan v. *Rodgers* (D. C. Cal.), 113 F. Supp. 638, 640; *Lawson* v. *Housing Authority*, 270 Wis. 269, cert. den. 349 U. S. 941. Nevertheless, the majority below said: "Activity in the Communist movement now involves a possible conspiratorial participation dangerous to the security of this country * * *. Activity in the world Communist movement has long since passed the boundaries of mere political opinion. It may well make a man a security risk, and, as we have pointed out, the courts cannot compel the Army to retain in its service a security risk." Appendix "B," *infra*, at p. 46. Whatever a "security risk" is, we agree that the courts cannot compel the Army to retain "one" in its service. *But we think this argument beside the point!* Petitioner took pains to make clear below that the First Amendment issue of his case had nothing to do with his retention in or discharge from the military establishment. It was applicable only to the "badge of dishonor" worn for life because of legal acts and associations, and because he was the son of a man "reported to be a member of the Communist Party" (J.A. 3). Our assertion is fortified by Judge Bazelon:

> "[Petitioner] does not challenge the [respondent's] power to remove him from the Army on mere suspicion that he is a security risk. But, whether or not the interests of national security justify dismissing a soldier on mere suspicion, [petitioner] claims that those interests are not served by branding such a soldier as a security risk as he passes through the gate." Appendix "B," *infra*, p. 55.

The decision below is in conflict with the principles enunciated by this Court in such cases as *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *American Communications Association* v. *Douds*, 339 U. S. 382, 402; *Hague* v. *C. I. O.*, 307 U. S. 496, and *Wieman* v. *Updegraff*, 344 U. S. 183. Because of its effect on soldiers drafted into the armed services, the "First Amendment" question raised by peti-

tioner in this case should be resolved by this Court, not only because it is a vital issue of Federal law, but because the court below has decided this question in a way in conflict with the applicable decisions of this Court.

Conclusion

The importance of the instant case is pointed up by a recent comment on Army discharge procedures in a leading law review:

> "The principal case [Harmon] is one of several cases recently decided in the lower federal courts involving judicial review of military discharge proceedings. In none of the decisions was the relief sought granted. However, inherent in each of these claims for federal relief are two distinct questions: (1) Do the lower federal courts have jurisdiction to grant review? (2) Once jurisdiction is recognized, to what extent will the courts review the proceedings. The *Harmon* case is particularly significant because it, unlike the other cases, has squarely raised the first of these problems." Comment, *Judicial Review of Army Discharge Procedures*, 9 *Stanford L. Rev.* 170, 171-172 (Dec., 1956).

The determination below means that the Army, through its discharge procedures, has the power to affect in a serious way the constitutional liberties and property of young Americans inducted into the military service, without any check at all from the courts. Moreover, since discharge certificates of this type are really dishonorable, their stigma may permanently cripple the victim's reputation and earning capacity. Authority to work such consequences in derogation of long-established American military tradition

to the contrary should not be lightly implied. Petitioner asserts, as did Judge Bazelon, that it does not exist. The questions he raises are ones which this Court should decide.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

Constitution

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes

Act of May 5, 1950, 64 Stat. 145, 10 U. S. C. 652a.

"No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial."

Section 4(b) of the Universal Military Training & Service Act of 1948, 62 Stat. 606, 50 U. S. C. App. 454(b).

"Each person inducted into the Armed Forces under the provisions of subsection (a) of this section shall serve on active training and service for a period of twenty-four consecutive months, unless sooner released, transferred, or discharged in accordance with procedures prescribed by the Secretary of Defense (or the Secretary of the Treasury with respect to the United States Coast Guard) or as otherwise prescribed by subsection (d) of section 4 of this title [subsection (d) of this section]."

Act of June 22, 1944, 58 Stat. 286, 38 U. S. C. 693h.

"The Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Navy, after conference with the Administrator of Veterans' Affairs, are authorized and directed to establish in the Army, Air Force and Navy Departments, respectively, boards of review composed of five members each, whose duties shall be to review, on their own motion or upon the request of a former officer or enlisted man * * * the type and nature of his discharge or dismissal, except a discharge or dismissal by reason of

the sentence of a general court martial. Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person. Witnesses shall be permitted to present testimony either in person or by affidavit and the person requesting review shall be allowed to appear before such board in person or by counsel * * * Such board shall have authority, except in the case of a discharge or dismissal by reason of the sentence of a general court martial, to change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board. The Articles of War and the Articles for the Government of the Navy are amended to authorize the Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Navy to establish such boards of review, the findings thereof to be final subject only to review by the Secretary of the Army, the Secretary of the Air Force, or the Secretary of the Navy, respectively * * *"

Act of August 2, 1946, 60 Stat. 837, 5 U. S. C. 191a.

"(a) The Secretaries of the Army, Navy, and Air Force, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and corrections so made shall be final and conclusive on all officers of the Government except when procured by means of fraud * * *"

Regulations

Army Regulation 615-375, Paragraph (2)(b).

"The purpose of a discharge certificate is to record the separation of an individual from the military service and to specify the character of service rendered during the period covered by the discharge."

Army Regulation 615-360, Paragraphs (7) through (9).

"FACTORS GOVERNING ISSUANCE OF HONORABLE AND GENERAL DISCHARGE CERTIFICATES

7. *General considerations.*—Because the type of discharge may significantly influence the individual's civilian rights and eligibility for benefits provided by law, it is essential that all pertinent factors be considered so that the type of discharge will reflect accurately the nature of service rendered. It is the policy of the Department of the Army to base evaluation of an individual's service and character on his over-all enlistment period rather than on any disqualifying entries in his service record during a particular portion of his current service. The effects of an honorable discharge and a general discharge are identical and entitle an individual so discharged to full rights and benefits. The undesirable discharge may or may not deprive the individual of veteran's benefits administered by the Veterans Administration and a determination by that agency is required in each individual case to fix the individual's rights. A dishonorable discharge deprives the individual of all veteran's benefits and may operate to deprive him of civil rights.

8. *Honorable discharge.*—a. Except as provided in these regulations and pertinent regulations listed in paragraph 13, an honorable discharge certificate will be fur-

nished when the individual meets the following qualifications:

(1) Has character ratings of at least 'very good.'

(2) Has efficiency ratings of at least 'excellent.'

(3) Has not been convicted by a general court-martial.

(4) Has not been convicted more than once by a special court-martial.

b. Notwithstanding the foregoing criteria, when disqualifying entries in the individual's service record during current service are outweighed by subsequent honest and faithful service over a greater period of time, an honorable discharge may be furnished. Ratings of "unknown" and ratings for periods of less than 2 months are not disqualifying. (See par. 37a (2), SR 615-20-1.) In addition, careful consideration will be given to the nature of the offense and sentence adjudged by a court-martial in applying the provisions of a (3) and (4) above, and when, in the opinion of the officer effecting discharge, these have not been too serious and severe, and the remainder of the service in the enlistment has been such that an honorable discharge would have been granted had the conviction not occurred, an honorable discharge certificate may be awarded.

9. *General discharge.*—Individuals discharged under honorable conditions which do not qualify them for an honorable discharge will be furnished a general discharge, except as provided below. Officers effecting discharge are authorized and required to deviate from this criteria and furnish an honorable discharge when, after considering all aspects of the individual's service, it appears that furnishing a general discharge would not be in the best interest of the service or the individual. Specifically, the above criteria may be deviated from in the following instances:

a. Regardless of previous record, an individual who has received a decoration or award, including a commendation ribbon or a lifesaving medal, will, provided his record subsequent to the act for which he was decorated, awarded, or commended would so entitle him, be furnished an honorable discharge.

b. An individual being separated with severance pay under the AR and SR 600-450-series will normally be furnished an honorable discharge.

c. When it is apparent from inconsistent entries in the service record that furnishing a general discharge is not warranted, an honorable discharge may be furnished (i. e., when ratings given are disqualifying but promotion with no subsequent reduction was given during period covered or when disqualifying ratings were given but individual was favorably considered for Good Conduct Medal at the same time).

APPENDIX "B"

Opinion of the Court of Appeals for the District of Columbia Circuit

No. 13230

JOHN H. HARMON, III,

Appellant,

v.

WILBER M. BRUCKER, Individually and as Secretary of the Department of the Army,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided January 31, 1957

Before PRETTYMAN, BAZELON and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge*: John Henry Harmon, III, was inducted into the Army on October 31, 1952, under the Universal Military Training and Service Act of 1948.[1] In May, 1953, some questions concerning membership in and relations with the Communist Party, and similar matters, were addressed to him by Army officials. He replied under oath, answering some questions and refusing to answer others on the ground of possible self-incrimination; his answers were reduced to writing and signed by him. In February, 1954, he was notified by the Adjutant General of the Army that he should reply to certain derogatory information which had been received

concerning him. This derogatory information was itemized in seven specifications, "a" to "g". Items "a" through "d" and Item "g" concerned reported activities on Harmon's part, Item "e" activity on his father's part, and Item "f" activities on his stepmother's part. Harmon replied to the items concerning himself, but as to Items "e" and "f" he said: "It is with deepest moral indignity coupled with a devout sense of filial piety, that I refuse to answer the derogatory statements made under allegations e and f. As neither my father nor stepmother are employed in any capacity by the federal government, I am led to the conclusion that derogatory information concerning them is wholly irrelevant to the case at hand." Thereafter Harmon was informed that his discharge as disloyal or subversive under Army Regulation 615-370 had not been favorably considered and that he would be retained in the service in his then-present grade. Shortly thereafter the Secretary of Defense issued Directive 5210.9, the purpose of which was to apply to military personnel the security programs established by Executive Order 10450 in respect to civilian Government employees. It directed that the standard for retention within the armed services should be "that on all the available information it is determined that the * * * retention is clearly consistent with the interests of national security." The directive was accompanied by a memorandum from the Secretary, directing that a review be made of all cases which had theretofore been cleared. Thereupon Harmon's case was reviewed, and the Army Personnel Board found that his further retention in the service was inconsistent with the interests of national security and recommended that he be discharged with an undesirable discharge. On June 2, 1954, he was discharged as undesirable. Harmon appealed to the Army Discharge Review Board to have the character of his discharge changed from undesirable

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[1] 62 Stat. 604, 50 U.S.C.A. App. § 451 *et seq.*

to honorable. He was given a hearing, at which he appeared, and thereafter his application for a change was denied. He applied to the Army Board for the Correction of Military Records for the change in his discharge, and that application was denied. He then made a direct request to the Secretary for award of an honorable discharge, and this request was reviewed by an Assistant Secretary, who referred it to the Board for the Correction of Military Records. Harmon declined a hearing before that Board, stating that he had no additional facts to present. He took the position that the discharge certificate must accurately and adequately reflect the character of his military service and that, inasmuch as the character of this service, as set forth in his service record, was "excellent", he should receive an honorable discharge. The Board recommended against a change in the discharge, and the Assistant Secretary approved that recommendation.

Harmon filed a complaint in the District Court, praying that the action of the Secretary in discharging him with an undesirable discharbe be declared null, void and illegal as in violation of the Constitution, the statutes, and Army regulations; and that his discharge be ordered changed from undesirable to honorable. On February 3, 1956, the District Court granted the Secretary's motion for summary judgment, on the ground that the court lacked authority to review, control or compel the granting of particular types of discharge certificates to persons discharged from the Army.[2] Harmon appealed. Thereafter the Army Discharge Review Board, in the course of a general review of military personnel security cases. reviewed Harmon's case, and the character of his discharge was changed from undesirable to general under honorable conditions. He was thereupon issued a discharge certificate reading:

GENERAL DISCHARGE

Under Honorable Conditions

from the Armed Forces of the United States of America

This is to certify that

John Henry Harmon III US51 207 184 Private AUS

was Discharged from the

ARMY OF THE UNITED STATES

on the 2d day of June 1954 under honorable conditions

[Signed] R L Richstatter
R L RICHSTATTER
Captain Adjutant General's Corps

The Secretary suggested to this court that the case thus became moot. Harmon opposed the suggestion, upon the ground that the controvery was whether he should receive an honorable discharge. This court, on August 17, 1956, by order denied the Secretary's suggestion of mootness.

The alleged derogatory information concerning Harmon which was incorporated in Items "a", "b" and "c" of the initial notice of the Adjutant General concerned activities in 1951 and 1952 in a camp reported to be Communist-operated, employement in 1949 in an organization reported to be subversive, and registration in 1952 with the American Labor Party, cited by the House Committee as being under Communist control. All these alleged activities were prior to Harmon's induction into the Army. Item "d" was that Harmon "Solicited contributions of money for the defense of persons under indictment for violation of the Smith Act." Within a month after his induction into the Army Harmon wrote a letter to two friends, suggesting that they make a financial contribution to assist in the defense of two individuals who had been indicted under the

[2] Harmon v. Brucker, 137 F. Supp. 475 (1956).

Smith Act. Item "g" was that Harmon had been "Associated with persons who were Communists or Communist sympathizers." In response to this item Harmon said he was not then nor had he ever been a member of the Communist Party but that in the course of appearances before many groups and audiences it was quite possible that he had known or been acquainted with Communists or their sympathizers.

In respect to Harmon's military service the Secretary says that his (Harmon's) service record was marked "excellent" for the periods November 12, 1952, to July 24, 1953, and from August 2, 1953, to April 24. 1954, and that for the balance of his service his record was marked "unknown" as to character and efficiency.

As the case is now before us, the questions are (1) whether the court can declare null and void the action of the Secretary in discharging Harmon with a "General Discharge under Honorable Conditions" and (2) whether the court can order the Secretary to change Harmon's Conditions" to "Honorable Discharge". We agree with the District Judge that the court cannot take either of such actions.

The nub of Harmon's contention on the first question is that he is entitled to judicial review of the Army's action. He does not contend that he could not be discharged; his complaint goes to the type of discharge given him. He was accorded all the procedural steps established by the Army regulations for the consideration and determination of the propriety of discharges from the military service. As we have pointed out, he specifically told the Army authorities that he had no further facts to present. No statute was misapplied in the process or the substance of the discharge. No statute directs or authorizes judicial of Army discharges. Indeed the statute provides that decisions of the Army boards shall be final.[3] Thus Har-

[3] Act of June 22, 1944, 58 Stat. 286, as amended, 38 U. S. C. A. § 693h.

mon's argument must rest upon constitutional grounds: that as a matter of due process of law or by some other constitutional requirement he was entitled to court review of the type of discharge which he should be given.

The Constitution provides that the President shall be Commander in Chief of the Army and Navy of the United States[4] and that Congress shall have power to make rules for the government and regulation of the land and naval forces.[5] Title 10 of the United States Code clearly expresses a Congressional intent that the Army be administered solely by the executive branch of the Government.[6] The statute in effect at the time of Harmon's discharge provided[7] that "No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, *except in the manner prescribed by the Secretary of the Department of the Army*, or by sentence of a general or special court-martial." (Emphasis ours.) Throughout our history the Articles of War and similar statutes have entrusted to the Secretary of War and his agents the granting of certificates of discharge.[8] The statute which authorized the Secretary to establish a board to review the types and natures of discharges specifically provided that the findings of such a board should be "final subject only to review by the Secretary of the Army".[9] The courts have

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[4] Art. II, § 2, cl. 1.

[5] Art. 1, § 8, cl. 14.

[6] 10 U. S. C. § 3012 (1956) [formerly 5 U. S. C. A. § 181—4, 64 Stat. 264 (1950)].

[7] 41 Stat. 809 (1920), as amended, 10 U. S. C. A. § 652a (Supp. 1956) [now 10 U. S. C. § 3811 (1956)].

[8] Winthrop, Military Law and Precedents 547, 931, 933, 961, 972 (2d ed. 1920); Act of April 2, 1806, 2 Stat. 359, 361; Rev. Stat. § 1342, Art. 4 (2 ed. 1878); Sec. 4(b), Selective Service Act of 1948, 62 Stat. 606, as amended, 50 U. S. C. A. App. §2454(b).

[9] *Supra* note 3.

held many times that they have no power to review the administrative processes by which the President and the Secretaries administer the affairs of the Army, and this doctrine has extended to the nature of discharges from the service.[10]. On 2this subject we said in *Gentila v. Pace*:[11]

> "We think Congress intended that the Board's [the Army Discharge Review Board's] full and 'final' review should not be subjected to a further review, or series of reviews. in the courts. We may suppose that Congress considered the heavy burden that would be imposed upon courts if they were required to review the findings upon which Army discharges are based. As the Supreme Court has said in regard to a type of dispute for which the Railway Labor Act provides, the 'intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.' Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 305, 64 S. Ct. 95, 99, 88 L. Ed. 61."

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[10] United States v. Eliason, 41 U. S. (16 Pet.) 291, 301-302, 10 L. Ed. 968 (1842); Reaves v. Ainsworth, 219 U. S. 296, 304, 306, 55 L. Ed. 225, 31 S. Ct. 230 (1911), *affirming* 28 App. D. C. 157 (D. C. Cir. 1906); Creary v. Weeks, 259 U. S. 336, 66 L. Ed. 973, 42 S. Ct. 509 (1922); French v. Weeks, 259 U. S. 336, 66 L. Ed. 965, 42 S. Ct. 505 (1922); Reid v. United States, 161 Fed. 469 (S. D. N. Y. 1908), *writ of error dismissed*, 211 U. S. 529, 53 L. Ed. 313, 29 S. Ct. 171 (1909); Davis v. Woodring, 72 App. D. C. 83, 111 F. 2d 523 (D. C. Cir. 1940); Schustack v. Herren, 234 F. 2d 134 (2d Cir. 1945); Nelson v. Peckham, 210 F. 2d 574 (4th Cir. 1954); Bernstein v. Herren, 136 F. Supp. 493 (S. D. N. Y. 1955), 141 F. Supp. 78 (S. D. N. Y. 1956), *aff'd*, 234 F. 2d 434 (2d Cir. 1956); Weeks v. United States, 51 App. D. C. 195, 277 Fed. 594 (D. C. Cir. 1922), *aff'd sub nom.* Creary v. Weeks, 259 U. S. 336, 66 L. Ed. 973, 42 S. Ct. 509 (1922); Marshall v. Wyman, 132 F. Supp. 169 (N. D. Cal. 1955); Nordmann v. Woodring, 28 F. Supp. 573 (W. D. Okla. 1939); McKenzie v. Kirkpatrick, 141 F. Supp. 49 (N. D. Cal. 1956).

[11] 90 U. S. App. D. C. 75, 77, 193 F. 2d 924, 927 (1951), *cert. denied*, 342 U. S. 943, 96 L. Ed. 702, 72 S. Ct. 556 (1952).

It is said that the foregoing statement was *dictum*. Whether that be so or not, we think the statement is correct. We adhere to it and adopt it for application here.

The import of the opinion of the Supreme Court in *Orloff* v. *Willoughby*[12] is the same as that of the opinions we have cited. There a physician inducted into the Army under the Doctors Draft Act[13] refused to state whether he was a member of the Communist Party. Because of this refusal he was not commissioned or given the duties of an Army doctor. He applied to a federal court for *habeas corpus* and for a discharge. He urged that it had been a uniform practice to commission Army doctors and, furthermore, that his induction under the Doctors Draft Act contemplated and required that he be given a commission. The Supreme Court held that the courts have no power to review such a matter, which fell within the executive duties of the President and the Army. The Court observed:

> "We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject

[12] 345 U. S. 83, 97 L. Ed. 842, 73 S. Ct. 534 (1953).
[13] 64 Stat. 826 (1950), 50 U. S. C. A. App. § 454(i).

to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service." [14]

Reason and the practicalities dictate the rule which we have found in the cases. Reason, flowing from the doctrine of the separation of powers, dictates that in many fields the administrative discretion of the executive branch and the legislative discretion of the legislative branch be not subject to interference or review by the courts. In no field is this doctrine more pertinent and important than in the operation of the armed forces. Provisions for the establishment and operation of such forces necessary to the security of this country are wholly legislative matters, and the administration of those forces is the very essence of executive action. The Constitution so provides. Only in the most extreme cases can the judiciary interfere in this area. As a practicality the operation of military forces requires expeditious, sometimes instant, action and thus requires discipline. From the standpoint of the Army it is easy to see the disastrous effect upon discipline if the type of discharge which could be given an enlisted man were not within the power of the commanding officer or the Secretary, but were subject to litigation and to review and decision by a court wholly removed from the necessities of military affairs. As a further matter of practicality, from the standpoint of the courts review of such matters would impose an appalling burden, with which the courts are wholly unequipped to cope.

Harmon's insistence is that the type of discharge given him must be determined by the character of his military service and without regard to pre-induction events, activities, etc. But that is not our question. Our question is not what type of discharge he ought to be given; it is whether a court of review can determine the type of discharge. Harmon says a court can and must do so. To reach that conclusion a number of propositions are suggested.

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[14] 345 U S. at 93-94.

The first such proposition concerns procedural due process. Harmon was given an opportunity to reply to the alleged derogatory information and was then issued a discharge. Thereafter he was given a hearing before the Army Discharge Review Board. He appealed that Board's adverse decision to the Army Board for the Correction of Military Records, again without success. Later, in connection with a direct appeal to the Secretary, he was offered a second hearing, which he declined. Harmon was thus given the full measure of procedural rights afforded by the Congress for persons in the military service. The Supreme Court held in *Reaves* v. *Ainsworth*,[15] "Besides, what is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts."

Harmon urges that the Army violated Directive 5210.9 by failing to give him a hearing. He was notified on May 26, 1954, of his proposed discharge. The Directive provides "an opportunity upon request to present any cause why he should not be so separated." Harmon made no such request. Later, as we have pointed out, he was afforded a hearing before the Review Board. The requirements of procedural due process were met.

We find no question of substantive due process. The consideration of pre-induction activity was not frivolous, arbitrary or discriminatory; it was based upon reasonable grounds. Activity in the Communist movement involves participation in a conspiracy dangerous to our national security. Surely the Army cannot be compelled to retain a security risk in its service. Surely the President may apply to military personnel the same program and policies

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[15] 219 U. S. 296, 304, 55 L. Ed. 225, 31 S. Ct. 230 (1911). And see Burns v. Wilson, 346 U. S. 137, 97 L. Ed. 1508, 73 S. Ct. 1045 (1953).

as to security and loyalty which he applies to civilian personnel in sensitive positions in the Government civilian service.[16] Harmon does not contend that he could not be separated from the service because of pre-induction conduct. If that be so, if he can be discharged as a security risk, the Army can determine whether he is or is not a security risk. And in that determination surely no data is more relevant and material than are his past habits, activities and associations. Such data is universally the material from which a determination of character or suitability is made, if indeed it is not the only material from which it can be made. The Army, in making that determination, was not trying to find him guilty or not guilty of some act or offense. It was trying to determine his character as a security risk *vel non* and his consequent suitability for Army service. If it could make that determination, as admittedly it could, and upon that basis could determine whether a man was suitable for any service whatsoever, it could include that consideration among the factors to be considered in determining the value of his service and, consequently, in selecting the type of discharge to be given him. Moreover it is reasonable for Army authorities to believe that a security risk is not usable for many types of military service required of other soldiers, and that factor may well affect the value of the military service of such a person and, consequently, the type of discharge given him.

An honorable discharge from the Army is, as Harmon claims it is, a mark of distinction. The courts cannot dictate to the Army that it must give this mark to an enlisted man when it finds, on the basis of pre-induction activities, that his presence in the armed forces is not consistent with the national security.

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[16] See Cole v. Young, 351 U. S. 536, 100 L. Ed. 1396, 76 S. Ct. 861 (1956); *cf.* Jason v. Summerfield, 94 U. S. App. D. C. 197, 214 F. 2d 273 (D. C. Cir. 1954), *cert. denied*, 348 U. S. 840, 99 L. Ed. 662, 75 S. Ct. 48 (1954).

It is suggested that a general discharge under honorable conditions imposes a "stigma" and so is punishment. Punishment, it is said, cannot be inflicted without judicial scrutiny. The Army can impose punishment, even the punishment, of death, without judicial review.[17] Moreover the type of a discharge is not punishment in the sense that judicial process is required. No finding of guilt, no loss of liberty are involved. The penalty is the same as that which results from many unhappy expeirences. Consideration of such "penalties" must begin in perspective. A discharge from civilian, commercial employment carries penalties in a real sense—stigma, loss of pay, difficulty in subsequent employment; but no one would suggest that an employer cannot discharge an employee without judicial scrutiny. A civilian employee of the Government can be dismissed upon charges of a criminal offense without judicial review.[18] The courts do not interfere in such matters. When the same "penalties" arise from action of military authorities, they do not thereby become "punishment" necessitating judicial action.

Stigma attaches on rejection from military service as a security risk. Indeed, if one be rejected entirely, on account of being a security risk, the adverse effects are greater than upon receiving a General Discharge Under Honorable Conditions. Many benefits attach to status under the latter which do not attach to rejection. And the intangibles of stigma attach in either event. Nevertheless it certainly cannot be urged that the Army may not reject, without judicial review, as a security risk one registered for service.

It is suggested that an honorable dicharge is of so great value that a man can be denied one only if he be afforded a right to judicial review. To hold to that effect

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[17] Burns v. Wilson, 346 U. S. 137, 97 L. Ed. 1508, 73 S. Ct. 1045 (1953).

[18] See, *e.g.*, Eberlein v. United States, 257 U. S. 82, 42 S. Ct. 12, 66 L. Ed. 140 (1921).

woudl be to vitiate the whole discharge process provided by the Secretary.[19] The courts have no authority to take such action. They cannot arrogate to themselves supervisory authority over the Army. Apt on this point is another quotation from *Reaves* v. *Ainsworth, supra.* The Supreme Court said:

> "The courts have no power to review. The courts are not the only instrumentalities of government. They cannot command or regulate the army. T o be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the army. • • • If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined." [20]

There is a margin of value of an "Honorable Discharge" over a "General Discharge Under Honorable Conditions". But a considerable measure of value is involved in a Government job, such as was involved in *Williams* v. *Cravens,*[21] and in the right of a contractor, such as were involved

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[19] On March 18, 1954, Robert T. Stevens, then Secretary of Defense, told the Senate Armed Services Committee: "When the evidence fails to show that he is disloyal, or is subversive, but does establish that he is otherwise a security risk and should be eliminated, he is separated under honorable conditions, usually with a general discharge." *Hearings on S. 3096,* 83d Cong., 2d Sess. 75.

[20] 219 U. S. at 306.

[21] 93 U. S. App. D. C. 380, 210 F. 2d 874 (D. C. Cir. 1954), *cert. denied,* 348 U. S. 819, 99 L. Ed. 646, 75 S. Ct. 30 (1954).

in *Larson* v. *Domestic & Foreign Corp.*,[22] and in a public utility business, such as was involved in *Kansas City Power & Light Company* v. *McKay.*[23] Yet in all these instances the holders of the rights were deprived of them without court review.

It is suggested that the consideration of pre-induction happenings is in conflict with the traditional policies of the Army. Most certainly we cannot order the Army to adhere to traditional practices. The armed forces in 1953-54 faced many new problems not involved in the operation of the military services of the 1770's, or the 1860's, or in 1917-18, or even in the early 1940's. Activity in the Communist movement now involves a possible conspiratorial participation dangerous to the security of this country. The efforts of this movement to infiltrate all parts of the Government pose new problems, which must be met with new rules and regulations.

Harmon argues that the pre-induction events considered by the Army were political opinions and so could not validly be considered under the First Amendment. Activity in the world Communist movement has long since passed the boundaries of mere political opinion. It may well make a man a security risk, and, as we have pointed out, the courts cannot compel the Army retain in its service a security risk.

We come now to the second of Harmon's prayers, that the court direct the issuance to him of an honorable discharge. It is settled beyond question that the courts will not direct by *mandamus* any executive action which lies within the realm of executive discretion.[24] This is a rule

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[22] 337 U. S. 682, 93 L. Ed. 1628, 69 S. Ct. 1457 (1949).

[23] 96 U. S. App. D. C. 273, 225 F. 2d 924 (D. C. Cir. 1955), *cert. denied*, 350 U. S. 884, 100 L. Ed. 780, 76 S. Ct. 137 (1955).

[24] Anderson v. McKay, 94 U. S. App. D. C. 11, 211 F. 2d 798 (D. C. Cir. 1954), *cert. denied*, 348 U. S. 836, 99 L. Ed. 660, 75 S. Ct. 51 (1954). See discussion and cases cited in Clackamas County, Ore. v. McKay, 94 U. S. App. D. C. 108, 219 F. 2d 479 (D. C. Cir. 1954).

of law quite apart from the peculiar insulation of Army affairs from judicial scrutiny. Harmon's prayer that the court direct the issuance to him of an honorable discharge is certainly a prayer for *mandamus*, and certainly the Congress has lodged within the area of executive discretion the selection of types of discharges to be given military personnel. So this prayer in Harmon's complaint does not lie within the jurisdiction of the court under the general rule applicable to all types of executive action. Even if such a prayer for mandatory direction ran only to a civilian matter which none of the elements of a military affair, the courts would have no authority in respect to it.

Affirmed.

BAZELON, *Circuit Judge*, dissenting: Appellant is a youth who was plucked out of civilian life and made a soldier, as are many others, at the threshold of the career he was planning for himself. Before the end of his term of service, he was restored to his civilian status, but hung about his neck was the millstone of "security risk." The Army has information about his civilian activities and associations on the basis of which it believes it would not be in the national interest to retain him as a soldier, but his military service is admitted to have been "excellent" and he is not claimed to have done anything illegal or reprehensible during his tour of duty. He does not challenge the discretion of the Secretary of the Army to judge whether the national security is served by dismissing a soldier. He complains only that, in the exercise of that discretion, there is neither necessity nor authority for inflicting upon him a gratuitous wound which may plague him all the rest of his days.

Appellant was inducted into the Army on October 31, 1952, as a draftee. On February 9, 1954, the Adjutant General of the Army informed him that the Army had received "derogatory" information about him and ordered

him to reply thereto. He replied in writing on March 11, 1954. On April 2, 1954, the Adjutant General of the Army, acting by order of appellee, informed appellant that, upon review of the derogatory information and appellant's replies thereto, it had been determined that appellant would not be discharged under AR 615-370 as disloyal or subversive, but would be retained in his grade until completion of his service period, at which time he would receive a discharge "appropriate to the character of service" he had rendered.[1] Five days later, the Secretary of Defense promulgated his Directive 5210.9, purporting to apply to military personnel the criteria of the civilian security program, Executive Order 10450 (April 27, 1953, 18 FED. REG. 2489), and to authorize dismissal of a soldier as a security risk if "on all the available information it is determined that [his] retention is [not] clearly consistent with the interests of national security." On

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[1] This comported with the traditional Army policy that the type of discharge be governed entirely by the service record, absent some disqualification covered by specific regulation. Thus, though a less than honorable discharge certificate can be given to a homosexual, a drug addict, a chronic alcoholic, a habitual shirker, a person with psychopathic personality, or a repeated petty offender (AR 635-208, formerly AR 615-368); to a deserter, a soldier who has entered the Army by fraud, or one who is convicted of crime in a civil court (AR 635-206, formerly AR 615-366); or to one who is "determined by investigation to be disloyal or subversive" (AR 615-370, as implemented by Special Regs. 600-220-1); where there is no such fault, an honorable discharge is called for if the soldier's conduct has been rated at not less than "good" and his efficiency at not less than "fair" (AR 635-200, par. 2). Former Secretary of the Army Stevens told a Senate Committee:

> The traditional policy of the Army has been that the discharge given should reflect the service rendered. In other words, a man whose conduct has been faithful and honest during the time in the service would be entitled to separation under honorable conditions, notwithstanding what his conduct may have been prior to entering the service. *Hearings, Senate Armed Services Committee on S. 3096*, 83d Cong., 2d Sess., March 18, 1954, at p. 75.

May 26, 1954, the determination to let appellant complete his service was reversed and he was informed that he would be given an "undesirable" discharge under AR 615-370 prior to the expiration of his service period. On June 2, 1954, he received such a discharge.[2]

Appellant sought unsuccessfully to have his discharge changed to "honorable," first by appeal to the Army Discharge Review Board and then, in turn, to the Army Board of Correction of Military Records and the Secretary of the Army. Having exhausted all possible administrative remedies, he commenced this suit seeking a declaration that his undesirable discharge was void and an order that it be changed to an honorable discharge. Cross-motions for summary judgment were made. The District Court, concluding that it lacked jurisdiction of the cause, denied appellant's motion and entered summary judgment against him. This appeal followed.

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[2] Defense Directive 5210.9 provides that the separation report of a soldier discharged as a security risk "will cite as authority the appropriate Armed Service directive under which separation is effected." Par. VIII-F-6. On June 2, 1954, when appellant was given his undesirable discharge, there was no specific Army directive dealing with security risks. AR 615-370, which was cited in the separation report as authority for the discharge, permits an undesirable discharge only upon a determination that the soldier is "disloyal or subversive." No such determination having been made regarding appellant, AR 615-370 was inapplicable. Indeed, appellee asserts that it was cited by mistake, the real basis for appellant's discharge being Directive 5210.9 itself.

By the time the Army Discharge Review Board reviewed appellant's discharge on April 11, 1956, and upgraded it to "General," the Army had already promulgated its specific "Personnel Security Clearance" regulations, AR 604-10, July 29, 1955. But those new regulations were not cited in the corrected separation report as authority for the action. The only additional authority cited for the new action was "Sec. 301, P. L. 346" which is merely the provision for review procedure. 58 STAT. 286 (1944), 38 U. S. C. § 693(h). Thus the only basis for appellant's discharge remains Defense Directive 5210.9.

The derogatory information the Army had about appellant was that he had been employed at what was "reported to be a Communist operated camp"; that he had been employed by the Detroit Urban League "reported to be a subversive organization"; that he had once "registered to vote in New York City with the American Labor Party * * * cited by the House Committee on Un-American Activities as being under Communist control * * *"; that he had solicited contributions for the defense of Smith Act prosecution defendants; that his father was reported to be a Communist and connected with various organizations cited as subversive by the Attorney General and to have registered many times with the American Labor Party; that his step-mother had registered with the American Labor Party for about ten years; and that he associated wtih Communists or Communist sympathizers.[3] In his written reply of March 11, 1954, appellant admitted summer employment by the camp as a kitchen-helper and assistant breakfast cook and by the Urban League as a counselor in its camp for under-privileged negro children. Concerning registration with the American Labor Party,

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[3] On May 7, 1953, the Army, without revealing this derogatory information to appellant, used it as the basis for interrogating him. On that occasi appellant denied that he was or had ever been a Communist or a member of any subversive organization, gave some details concerning persons about whom he was asked, described the circumstances under which he solicited funds for the defense of the Smith Act defendants, and gave sundry other information. With respect to a number of questions, appellant invoked his privilege under the Fifth Amendment and under Article 31 of the Uniform Code of Military Justice, 64 Stat. 118, 50 U. S. C. § 602, against self-incrimination. He later explained that he had invoked his privilege as a result of fear and apprehension growing out of the circumstances of the interrogation and the fact that he was without counsel. The questions as to which he had invoked the privilege were put to him again in the February 9, 1954, order and he answered all of them, except those relating to his parents. As to those, his refusal was based not on privilege, but rather on "moral indignity [*sic*]," "filial piety," and the assertion that they were irrelevant.

he had admitted it when first interrogated in May 1953,[4] and now added only that, since it was a legally recognized political party, he felt he could properly vote for it. Similarly, he had earlier admitted soliciting funds for the defense of two Smith Act indictees, and now merely added that he felt he had a right to do so. He denied that he was or had ever been a member of the Communist Party, but said that it was possible that he had known or been acquainted with Communists or sympathizers. The allegations concerning his parents he refused to reply to, as he had at his earlier interrogation. The District Court noted in its opinion that "Save for plaintiff's continuing association with his parents and for writing one letter requesting contribution for the legal defense of two persons indicted under the Smith Act, all charges against plaintiff were based on conduct antedating his induction into the Army."[5]

In his complaint, appellant alleged that his character and efficiency rating had been "excellent." In his first answer, filed July 19, 1955, appellee admitted this allegation. On November 29, 1955, however, by amended answer, he pointed out that for about a week in July 1953 and for the period after April 24, 1954 (shortly before his discharge was ordered) appellant's rating was recorded as "unknown." But, under Army regulations, "ratings of 'unknown' and ratings for periods for less than two months are not 'disqualifying.'"[6]

Appellant also alleged that he was not and had never been a member of the Communist Party, or any Communist organization, or any organization advocating overthrow of the government or advocating or approving violence in denying others constitutional rights, or any organization seeking to alter our form of government by

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[4] *Supra*, note 3.

[5] Harmon v. Brucker, 137 F. Supp. 475, 476 (D. D. C. 1956).

[6] AR 615-360, par. 8b.

unconstitutional means, or any organization which, so far as he knew, had ever engaged in subversive activities. He also alleged that he was and always had been "completely and unswervingly loyal to the Government of the United States" and that he "would not hesitate to lay down his life in defense of the United States against any and all of its enemies whomsoever." Appellee denied these allegations, not on the ground that he believed them to be untrue but because of "lack of knowledge and information sufficient to form a belief" concerning them.

Appellee's first contention is that we should not even reach the question whether the District Court correctly declined jurisdiction. He informs us that, after this appeal was filed, the Adjutant General notified appellant that the character of his discharge had been upgraded from "undesirable" to "General (under honorable conditions)" and he asserts that there is, therefore, no longer a judicially cognizable case or controversy.[7] This new form of discharge, however, is not the legal equivalent of the honorable discharge which appellant sought.

It may well be, as appellee states, that none of the benefits available to discharged soldiers under federal law are withdrawn from the holder of such a "general" discharge as this. Many benefits are conferred, however, by the statutes of the State of New York, where appellant resides, and those statutes all use the language "honorable discharge" or "honorably discharged." Although the New York courts have not decided whether this excludes holders of a discharge entitled "General (under honorable conditions)", the late Judge Frank of the Court of Appeals

[7] The majority expresses no specific opinion as to this contention. It would seem, however, since the majority proceeds to deal with the question of the District Court's jurisdiction, that it rejected the contention that there is no longer a judicially cognizable case or controversy.

for the Second Circuit suggested that it would.[8] But whatever may be said of the technical legal equivalence or difference between the two types of discharge, from a real-life point of view they are vastly different. The portion of our population holding honorable discharge certificates from the armed services is now so great that an adverse reflection is inherent in a certificate which is other than "honorable."[9] This is of, course, confirmed by the statement of appellee's counsel in oral argument that "every soldier gets an honorable discharge unless there is some blemish on his record on account of which he receives a discharge other than honorable."

Nor is the new form of discharge defensible on the ground that the separation report does not on its face indicate that it was based on security considerations. The same observation could be made concerning the "undesirable" discharge. In both instances, however, a person sufficiently interested to check army regulations would discover the "security" character of the discharge. In the case of the "undesirable" discharge the only reference to

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[8] "Although a General Discharge (Under Honorable Conditions) apparently entitles a veteran to most, if not all, benefits under federal law, the statutes of New York, of which plaintiff is a resident, requires [*sic*] that a veteran have an Honorable Discharge in order to be eligible for various benefits under state law. See *e.g.*, New York Military Law Sections 245, 250; New York General Municipal Law Section 148; New York Education Law Section 609; New York General Business Law Section 32." Schustack v. Herren, 234 F. 2d 134, 135 n. 2 (2d Cir. 1956).

[9] What the Supreme Court said in Wieman v. Updegraff, 344 U. S. 183, 190-91 (1952), concerning the discharge of an employee on disloyalty grounds is, we think, not inapplicable here:

> There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when "each man begins to eye his neighbor as a possible enemy."

security was the citation of the "disloyal or subversive" regulation, AR 615-370, as the "Reason and Authority for Separation." The separation report accompanying the "General" discharge recited that "Para. 10, AR 615-120 applies." This regulation was cited, according to appellee, "to inform recruiting officers that appellant is ineligible for enlistment in the Regular Army." [10] As anyone may discover, this is a reference to AR 604-10, paragraph 15d, which provides:

> No applicant will be appointed or enlisted without the specific approval of the Secretary of the Army if his separation from previous service indicates that he was relieved from active duty or discharged either as a security risk or for reasons other than security while undergoing investigation under the provisions of these regulations or of corresponding security regulations issued by the other military departments. AR 615-120 applies with respect to former members of the armed services seeking enlistment or reenlistment in the Army.

See also Defense Department Directive 5210.9, par. II.

Our jurisdiction to entertain the appeal being unimpaired, the next question to consider is the District Court's ruling that, under our decision in *Gentila* v. *Pace*, 90 U. S. App. D. C. 75, 193 F. 2d 924 (1951), it was "constrained" to disclaim jurisdiction of the cause.

"Stripped of self-contradiction and legal conclusions all that [Gentila's] complaint allege[d]" was that his dishonorable discharge for desertion rested upon "an erroneous finding of fact" that he was mentally capable of forming an intent to desert. We held that "merely

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[10] Compare, in this connection, Bailey v. Richardson, 86 U. S. App. D. C. 248, 257-58, 182 F. 2d 46, 55-56 (1950), *affirmed by an equally divided Court*, 341 U. S. 918 (1951), in which in sustaining the validity of the Government's civilian employee loyalty program, we pointed out that "mere dismissal from the Government service" is not punishment in the sense that permanent proscription from Government service had been held to be in United States v. Lovett, 328 U. S. 303, 316 (1946).

erroneous findings of fact by the Discharge Review Board shall not be revised by a court." 90 U. S. App. D. C. at 77, 193 F. 2d at 927. Although the District Court recognized that the instant case involved questions of law, it nevertheless thought *Gentila* controlling on the ground that both cases also involve "a review of the findings upon which the separation was based * * *." *Harmon* v. *Brucker*, 137 F. Supp. 475, 477 (D. D. C. 1956). In this the District Court was wrong. The "findings upon which the separation [in the present case] was based" are not challenged at all. Indeed, as the majority opinion points out, appellant does not challenge the appellee's power to remove him from the Army on mere suspicion that he is a security risk.[11] But, whether or not the interests of national security justify dismissing a soldier on mere suspicion, appellant claims that those interests are not served by branding such a soldier as a security risk as he passes through the gate.[12] The issue he raises is one of law; whether appellee may withhold an honorable discharge from a soldier whose conduct and efficiency ratings have never been less than "excellent," even assuming the correctness of all of the information appellee relies upon. That claim being "wholly dependent upon a question of law," it is within the jurisdiction of the Dis-

[11] Cf. Bailey v. Richardson, *supra*, note 10, 86 U. S. App. D. C. at 263, 182 F. 2d at 61: "The Constitution does not require the President to continue to use in the training of Government personnel, the work performed by this appellant, a person whose loyalty to the Government he suspects. There is no reason in the Constitution why the President should not limit the training staff to persons whose loyalty is beyond the faintest shadow of suspicion."

[12] Even in the case of a civilian Government employee who sought the position he holds, rather than being drafted, although we said that "mere dismissal" is not punishment and that there is no redress for injury suffered "in the process of dismissal," we recognized no authority to inflict gratuitous injury over and above the dismissal. Bailey v. Richardson, *supra*, note 10, 86 U. S. App. D. C. at 257-58, 265, 182 F. 2d at 55-56, 63.

trict Court. *United States* v. *Williams*, 278 U. S. 255, 257-58 (1929); NOTE, 70 HARV. L. REV. 533, 539-40 (1957). Nothing in *Gentila* v. *Pace, supra*, is to the contrary. Nor can I accept it as settled (either by this court or the Supreme Court) that courts may not in circumstances like these review the issuance of a less than honorable discharge. As was pointed out in *Schutack* v. *Herren*, 234 F. 2d 134, 135 n. 1 (2d Cir. 1956), "The Supreme Court has not yet spoken on the question of 'whether and to what extent the courts have power to review or control the War Department's action in fixing the type of discharge certificates issued to soldiers [footnote omitted] * * *.' Patterson v. Lamb, 329 U. S. 539, 542, 67 S. Ct. 448, 449, 91 L. E. 485." In the footnote, the Supreme Court referred, among other authorities, to the decision of this court in *Denby* v. *Berry*, 51 App. D. C. 335, 279 Fed. 317 (1922), *reversed on other grounds*, 263 U. S. 29 (1923). In that case we held "void and without authority of law" what we thought to be a discharge which did not comport with statutory procedure.[13] See also *Davis* v. *Woodring*, 72 U. S. App. D. C. 83, 85, 111 F. 2d 523, 525 (1940).

That appellant seeks, in addition to a declaration that the discharge given him was void, an order that he be given an honorable discharge does not, in my view, deprive the District Court of jurisdiction. If, upon review, the discharge given appellant is declared to be void, we must assume that the Secretary would issue a discharge which is not void. *Denby* v. *Berry, supra*. Moreover, if the District Court finds the denial of an honorable discharge to rest on legally insufficient grounds, it may, at

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[13] Our decision was reversed by the Supreme Court upon the ground that what we considered a discharge was actually merely a transfer from active to inactive status, something wholly within the discretion of the commander-in-chief.

least, enjoin a denial for such reasons. *Perkins* v. *Elg*, 307 U. S. 325, 349-50 (1939); *Shachtman* v. *Dulles*, 96 U. S. App. D. C. 287, 294, 225 F. 2d 938, 940 (1955).

Both parties request that we decide the merits of this controversy—namely, whether the Universal Military Training and Service Act of 1948, 62 STAT. 606, 50 U. S. C. App. § 454(b),[14] pursuant to which Directive 5210.9 was promulgated, authorizes issuance of less than an "honorable discharge" certificate, in the circumstances of this case. But I think that since the District Court never reached consideration of the merits, sound judicial practice requires that it should first have that opportunity.

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[14] The statute sets the draftee's term of service at two years, "unless sooner released, transferred, or discharged in accordance with procedures prescribed by the Secretary of Defense * * *"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 80

JOHN HENRY HARMON, III, *Petitioner,*

v.

WILBER M. BRUCKER, individually and as Secretary of the Department of the Army, *Respondent.*

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

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v.

WILBER M. BRUCKER, individually and as Secretary of the Department of the Army, *Respondent*.

PETITIONER'S REPLY BRIEF

STATEMENT

Respondent's brief in opposition to the Petition for Certiorari argues extensively that no legal injury has been caused petitioner by respondent's issuance to him of a General Discharge Under Honorable Conditions (*Res. Br.* 8-11). We disagree. The General Discharge proffered petitioner jeopardizes him not only in his profession, his job opportunities and his reputation, it also extinguishes his right to valuable benefits provided veterans by the laws of the State of New York. In *Peters* v. *Hobby*, 349 U.S. 331, this Court said that

"substantial rights affecting the lives and property of citizens are at stake." *Id.*, at p. 347. They are at stake here, too.[1]

I

A "General (under honorable conditions)" discharge is not an "Honorable" discharge. See, *AR 615-360, par's. 7-9* (Pet. App. 30-32). While a "General" discharge does not automatically deprive petitioner of Federal veterans' benefits, he will nonetheless be deprived of various and substantial benefits provided veterans by the State of New York. For example, only veterans holding "Honorable" discharge certificates or their wives, widows and minor children may be entitled to certain burial benefits, *N.Y. Gen. Mun. L.*, § 148; the children of only those veterans holding "Honorable" discharge certificates may be entitled to state educational scholarships, *N.Y. Educ. L.*, § 609; only veterans holding "Honorable" discharge certificates may be entitled to retire at a younger age than others from the school system, *N.Y. Mil. L.*, § 245; and only "Honorable Discharge" certificates or "Honorable Service" certificates may be recorded so as to put public officials on notice of the facts set forth therein, *N.Y. Mil. L.*, § 250. To say, therefore, that petitioner would not be injured by the award of a "General Discharge Under Honorable Conditions," rather than an "Honorable Discharge,"

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[1] Indeed, it appears that the court below twice rejected respondent's contention. The first time was on August 17, 1956, when it denied respondent's suggestion of mootness (R. 120); the second time, as Judge Bazelon points out, when in dealing with the question of jurisdiction, "it [seemingly] rejected the contention that there is no longer a judically cognizable case or controversy" (Pet. App. 52, ftn. 7). Cf. *Friedman* v. *International Association of Machinists* (C.A. D.C.), 220 F. 2d 808, 810, cert. den., 350 U.S. 824.

is to disregard the plain and unmistakable provisions of applicable state statutes and the tangible benefits for which they provide.[2] But more important than the loss of the tangible benefits to which we have adverted is the stigma attached to anything other than an "Honorable Discharge." To say that no stigma attaches to the "General Discharge Under Honorable Conditions" is to hide from reality. Or, as Judge Bazelon put it in his dissent below:

> "But whatever may be said of the technical legal equivalence or difference between the two types of discharge, from a real-life point of view they are vastly different. The portion of our population holding honorable discharge certificates from the armed services is now so great that an adverse reflection is inherent in a certificate which is other than 'honorable.' This is, of course, confirmed by the statement of [respondent's] counsel in oral argument that 'every soldier gets an honorable discharge unless there is some blemish on his record on account of which he receives a discharge other than honorable.'" (Pet. App. 53.)

These facts have been recognized by the recent decision in *Schustack* v. *Herren* (2 Cir.), 234 F. 2d 134, where the late Judge Jerome Frank noted plaintiff's argument that a "less than honorable discharge may have important adverse effects on a veteran's eligibility for various benefits under federal and state law,[3] and on his success in obtaining private or govern-

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[2] In this connection, it will be noted that the New York statutes make a marked distinction between an "honorable discharge" and a discharge "under honorable conditions." See, *e.g.*, and compare *N.Y. Educ. L.*, § 608 with *N.Y. Educ. L.* § 609. Cf. *Ops. Atty. Gen.* (N.Y.), 51 St. Dept. 281, 291 (1934).

[3] *Id.*, 234 F. 2d 135, ftn. 2.

mental employment.[4] * * * Besides this direct pecuniary harm, it involves a social stigma likely to harm plaintiff substantially. * * * Such effects may be aggravated by the requirement that the discharge papers of persons who do not complete their normal tour of duty, but are separated pursuant to AR 604-10 * * *, contain the statement 'AR 604-10 applies,' thus publicly proclaiming that the Army considers such persons to be security risks." *Id.*, 234 F. 2d, at p. 135.

In the case at bar, if we assume *arguendo* that the words "AR 604-10 applies" will not appear on petitioner's corrected discharge certificate (R. 114), respondent, in the words of Judge Frank, will not have "aggravated" the "direct pecuniary harm" and the "social stigma" otherwise caused by the proffered "General" discharge. However, the absence of the words "AR 604-10 applies" on petitioner's discharge certificate means only that, instead of publicly proclaiming petitioner a "security risk," the Army says petitioner is either militarily inept, a homosexual, disloyal, or, perhaps, subversive.[5] In any event, the various comments made by Senators and officials of

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[4] *Id.*, 234 F. 2d 135, ftn. 3.

[5] This was made clear during the hearings before the Senate Sub-Committee on Constitutional Rights on the 18th day of November, 1955:

"Private Ross: I believe it had subversives and disloyal, because I looked that up. I know it had them. But I think it also had homosexuals, and so forth.

"Mr. Hocker: So that anybody who reads that paper—

"Private Ross: Will get the impression—

"Mr. Hocker: And then reads the certificate you give him, will have the choice of deciding whether you are subversive or disloyal or homosexual?

"Private Ross: That is right." (*Hearings, Sub-Committee on Constitutional Rights, Senate Judiciary Committee, pursuant to S. Res. 94*, 84th Cong., 2d Sess. p. 442).

the Department of Defense during the *Hearings* before the *Senate Committee on Armed Services on S. 3096,* 83rd Cong., 2d Sess., March 18, 24, April 1, 8, 1954, bear striking witness to the *substandard* character of the "General Discharge." See, *Hearings, id.,* at pp. 44, 45, 74, 75, 76, 128, 132, 133, 152, 153. As Senator Kefauver aptly stated:

> "Some might say that that doesn't mean much, but if they go to apply for a position or a job, and it is * * * any kind of discharge other than honorable, ordinarily they may as well not apply, because they are not going to get a job. You can do all the explaining in the world, but there isn't a chance, if it doesn't say 'honorable.'" *Id.,* at p. 153.

In the dissent below, Judge Bazelon pointed out that "[i]t may well be, as [respondent] states, that none of the benefits available to discharged soldiers under federal law are withdrawn from the holder of such a 'general' discharge as this. Many benefits are conferred, however, by the statutes of the State of New York, where [petitioner] resides, and those statutes all use the language 'honorable discharge' or 'honorably discharged.' Although the New York courts have not decided whether this excludes holders of a discharge entitled 'General (under honorable conditions),' the late Judge Frank of the Court of Appeals for the Second Circuit suggested that it would. * * * Nor is the new form of discharge defensible on the ground that the separation report does not on its face indicate that it was based on security considerations. The same observation could be made concerning the 'undesirable' discharge. In both instances, however, a person sufficiently interested to check army regulations would discover the 'security' character of the discharge." (Pet. App. 52-53).

In petitioner's case, the "General" discharge certificate inflicts even more damage. As a law student and prospective candidate for admission to the Bar of the State of New York (R. 2), the character of the proffered certificate erects a serious obstacle to petitioner's prospective career (R. 116-117).[6] Solely because petitioner engaged in non-criminal, constitutionally-protected conduct (which occurred primarily, if not exclusively, prior to induction), he is proffered a "General" discharge, although his exemplary record of military service clearly entitles him to an "Honorable" one. See, *AR 615-360, par. 8a.* In such circumstances, and where the "General" discharge jeopardizes petitioner not only in his profession, his job opportunities and reputation, but also extinguishes his right to valuable veterans' benefits provided by the laws of New York, we think it clear that legal injury has been suffered.[7]

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[6] Cf. Brown & Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. of Chi. L. Rev. 480.

[7] Commenting on this very issue, the *Stanford Law Review* noted: "The Army has furnished ex-private Harmon with a 'general' discharge under honorable conditions, and the Government is now urging that the case has become moot. * * * With a minor exception giving preference to honorably discharged veterans in the appointment of federal court criers and bailiffs, 28 U.S.C. § 775 (1952), this will entitle him to the same federal veterans' benefits as he would have been entitled to under an 'honorable' discharge. * * * However, many state benefits hinge on an 'honorable' discharge. See Zearing v. Johnson, 10 Cal. App. 2d [illegible] 52 P. 2d 1019 (2d Dist. 1935); Horylev v. New York State Bonus Comm'n., 220 App. Div. 345, 221 N.Y. Supp. 548 (3d Dept. 1927). The plaintiff may suffer such losses in his home state. * * * The 'general' discharge by its very nature, and the report of separation since it indicates as authority for discharge the personnel security regulation, U.S. Army Reg. No. 604-10 Par. 19(b), will stigmatize him for life." *Judicial Review of Army Discharge Procedures*, 9 Stan. L. Rev. 170, 171 (Dec. 1956).

II

This Court will undoubtedly recognize that petitioner was discharged under the provisions of Department of Defense Directive 5210.9 (*Res. Br.* 4-5). Paragraph VIII(F)(6) of that Directive provides:

> "In the case of separation of any member of the Armed Services, under conditions outlined in the preceding sub-paragraph, the DD Form 214 (Report of Separation) will cite as authority the appropriate Armed Service directive under which separation is effected." (R. 43)

Respondent notwithstanding (*Res. Br.* 7-8), petitioner has not yet received a General Discharge Under Honorable Conditions. He has been offered one (R. 110-112). The DD Form 214 (Report of Separation) proffered petitioner does not contain the words "AR 604-10" in paragraph 8 thereof (R. 113). Nevertheless, the words "AR 604-10 SPN 82" are required to be cited in paragraph 8. See, *Army Regulation (AR) 604-10*, par. 19(b).[*] In other words, petitioner's "Official Report of Separation from the Armed Forces" is required by regulation to stigmatize peti-

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[*] Paragraph 19(b) of the Army's "security risk" directive (AR 604-10) provides:

> "The Report of Separation From the Armed Forces of the United States (DD Form 214) of members discharged under the provisions of these regulations will indicate in item 8: 'AR 604-10 APN 82.' The letter of separation and/or discharge certificate of officer and enlisted reservists not on active duty will indicate: 'AR 604-10 applies.' Members relieved from active duty or discharged prior to completion of an action under these regulations will have 'Paragraphs 9 and 20 (as appropriate), AR 615-120 applies' entered in item 38, DD Form 214."

tioner as a "security risk." *Schustack* v. *Herren* (2 Cir.), 234 F.2d 134, 135. Inasmuch as petitioner has not yet received the General Discharge Under Honorable Conditions proffered him on June 6, 1956, it must be presumed that respondent will correct this omission from petitioner's DD Form 214 in conformity with the requirements of Department of Defense Directive 5210.9, par. VIII(F)(6), and AR 604-10, par. 19(b). See, *Ramspeck* v. *Federal Trial Examiners Conference*, 345 U.S. 128, 142-143; *R. H. Stearns Co.* v. *United States*, 291 U.S. 54, 63; *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15.

Viewed in this light, respondent's assertion that petitioner has not suffered any judicially recognizable injury is little short of ludicrous, especially where, as here, Department of Defense Directive 5210.9 and AR 604-10 require petitioner's "Official Report of Separation from the Armed Forces of the United States" to bear the notation for all the world to see: "AR 604-10 [the security risk regulation] applies." In the context of popular opinion in this country today, it is difficult to conceive of a deeper stain, or greater infamy. *Wieman* v. *Updegraff*, 344 U.S. 183, 190-191. With a "General Discharge" identified as a discharge under security regulations, it permanently stigmatizes a man with the concomitant result that he is barred for life from major areas of gainful employment.[9] A determination that an individual is a "secur-

[9] Rowland Watts, a leading authority in the field, has said with regard to the "General Discharge Under Honorable Conditions," that:

> "AR 615-360 states that, 'The effects of an honorable discharge and a general discharge are identical and entitle an individual so discharged to full rights and benefits.' While this is technically true under the letter of federal law, it is

ity risk" now renders it impossible for him to obtain employment in the Federal Government, or in state or local government; opportunities in private employment are either drastically diminished or completely extinguished. In many professional fields, such a person must abandon his life's work. Specific industries, such as the maritime, or the motion picture industry, or those industries engaged in work on Government contracts, are closed to him. Other industries unofficially

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not always true under varying state laws and is generally not true as far as private employment is concerned. As the discharge certificate in these cases has typed on it '[AR 604-10] applies'—which only means 'Disloyal and Subsersive'—it is an effective bar to all public employment, virtually all defense industry employment, and most other private employment where the discharge certificate has to be shown. It is generally recognized that a General discharge is 'sub-standard.' In the absence of the 'Disloyal and Subversive' identification, it is used in such cases as military ineptitude or minor manifestations of homosexual propensities. The Army is so aware of its lesser value that the regulations provide: 'Notwithstanding the foregoing criteria * * *, when disqualifying entries in the individual service record during current service are outweighed by subsequent honest and faithful service over a greater period of time, an honorable discharge may be furnished. * * * In addition, careful consideration will be given to the nature of the offenses and sentence adjudged by a court-martial in applying the provisions of *a*(3) and (4) above, and when, in the opinion of the officer effecting discharge, these have been not too serious and severe, and the remainder of the service in the enlistment has been such that an honorable discharge would have been granted had the conviction not occurred, an honorable discharge certificate may be awarded.' (AR 615-360, par. 8b.) * * * Yet the General discharge has become the general dumping ground for all those against whom security charges are brought although the charges have not been 'proved' even by the Army's dubious standards of proof. It is the Army's way of creating the label of 'Almost Subversive.'" Watts, "*The Draftee and Internal Security, A Study of the Army Military Personnel Security Program*," (New York, 1955), pp. 80-81.

refuse to admit him, and if he were to attempt to secure employment in a foreign country, he would find it difficult to secure a passport. On the personal level, his reputation is blighted and the social status of his family impaired. Marked for life, his reputation as well as his ability to earn a livelihood is seriously jeopardized. So far as the public is concerned, the term "security risk" is synonymous with "traitor."[10]

If, as respondent contends, the legal effect of a "General (under honorable conditions)" discharge is the same as an "Honorable" one, there is now no reason for denying petitioner the "Honorable" discharge he seeks. Only then can respondent successfully argue that petitioner has not suffered an injury cognizable by this Court. *Perkins* v. *Elg*, 307 U.S. 325, 349-350; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123; *Peters* v. *Hobby*, 340 U.S. 331, 347.

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[10] See, *e.g.*, *Hearings, Senate Sub-Committee, Committee on Post Office and Civil Service, pursuant to S. Res. 20*, 84th Cong., 1st Sess., June 3, 9, 23, August 30, 21, 1955 at pp. 67, 121-122, 130, 271, 550, 573, 599, 627. See also: *Hearings, Subcommittee on Constitutional Rights, Senate Judiciary Committee, pursuant to S. Res. 94*, 84th Cong., 2d Sess., November 18, 22, 1955, pp. 361-362, 393-394, 526-527.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 99) is reported at 137 F. Supp. 475. The opinions of the Court of Appeals, i.e., the majority opinion of Judge Prettyman and the dissenting opinion of Judge Bazelon (R. 121) are reported at 243 F. 2d 613.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1957 (R. 147). The petition for a writ of certiorari was filed on February 15, 1957, and was granted on May 13, 1957 (R. 151). The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254.

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The Constitutional provisions involved are the First, Fifth and Sixth Amendments to the Constitution of the United States. The statutes involved are the Act of May 5, 1950, 64 Stat. 145, 10 U.S.C. 652a; Section 4(b) of the Universal Military Training & Service Act, 62 Stat. 606, 50 U.S.C. App. 454(b); the Act of June 22, 1944, 58 Stat. 286, 38 U.S.C. 693h; and the Act of August 2, 1946, 60 Stat. 837, 5 U.S.C. 191a. The Regulations involved are Department of Defense Directive 5210.9, issued April 7, 1954 (set forth in full at pp. 33-45 of the Record), Army Regulation 615-375, Paragraph (2)(b), and Army Regulation 615-360, Paragraphs (7) through (9). All Constitutional, statutory and regulatory provisions, except as otherwise noted, are set forth in the Appendix, *infra*, at pp. 49-54.

QUESTIONS PRESENTED

1. Did the District Court have jurisdiction to review a less than honorable discharge furnished an inducted soldier as a security risk (because of non criminal, constitutionally-protected conduct occurring primarily, if not exclusively, prior to induction), and to grant the relief requested by petitioner where the discharge certificate did not accurately reflect the

character of petitioner's excellent military record and violated applicable regulations, statutes and constitutional provisions?

2. (a) While Section 4(b) of the Universal Military Training & Service Act may have authorized the Secretary of Defense to remove "security risks" from the Armed Forces, was Department of Defense Directive 5210.9, par. VIII(F)5 (under which petitioner was stigmatized for life with a less than honorable discharge certificate for having engaged in constitutionally-protected and non-criminal conduct extraneous to the character of his actual military service) invalidly authorized, *ultra vires* and void?

(b) If not, is Section 4(b) of the Universal Military Training & Service Act, as applied to petitioner, in violation of the First, Fifth and Sixth Amendments to the Constitution of the United States?

3. Petitioner was not found disloyal by respondent, and the character and efficiency of his actual military service up to the time of his discharge were admittedly excellent. His less than honorable discharge as a security risk was based on non-criminal conduct which occurred primarily, if not exclusively, prior to his induction, and was wholly unrelated to the actual character of his military service. Moreover, he was given neither a hearing prior to his discharge nor any statement of the reasons why he was declared a security risk, nor any opportunity to confront and cross-examine the witnesses against him. Was the aforesaid action of respondent in furnishing petitioner a less than honorable discharge certificate (which, by reflecting more than a record of military service, brings reproach and dishonor in civilian life and extinguishes petitioner's right to certain valuable state

veterans' benefits), in violation of the First, Fifth and Sixth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

A. Petitioner

Petitioner, a resident of the State of New York and prospective applicant for admission to the Bar, was duly inducted into the Army on October 31, 1952. Former Private Harmon's induction was accomplished under the provisions of the Universal Military Training & Service Act. 62 Stat. 604, 50 U.S.C. App. 451 *et seq.* (R. 2-3, 19).

On May 7, 1953, petitioner was interrogated concerning his beliefs, attitudes, associations and opinions at the Indiantown Gap Military Reservation, Indiantown Gap, Pennsylvania, where he was then stationed (R. 91-98). With respect to some of the questions asked by the military authorities, petitioner invoked his privilege against self-incrimination (Uniform Code of Military Justice, Article 31, 64 Stat. 118, 50 U.S.C. 602), but denied membership in the Communist Party.[1]

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[1] On October 22, 1954, petitioner explained his invocation of the privilege against self-incrimination in testifying under oath before the Army Discharge Review Board, as follows:

> "Applicant: Well, quite frankly, I was afraid for one reason and, secondly, I did not have the advice of counsel. I was afraid in the sense that when I was first sent up to the Indiantown Gap I was awakened from sleep and introduced to six gentlemen from the Counter Intelligence Corps, and that included the Commanding Officer, a stenographer, and a Sergeant-at-Arms, and I was searched and then taken down to G-2 headquarters and there I was questioned by the battery of these gentlemen from the Counter Intelligence Corps.

On February 9, 1954, petitioner was notified by the Adjutant General that he was to reply to certain derogatory information which had been received concerning him, to wit:

"That you—

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did not feel that I could truthfully and honestly answer all the questions that were presented to me—when they were thrown at me in such rapid fire. (R. 64) • • •

"Member: Mr. Harmon, on the 7th of May, 1953 you were asked certain questions in regard to which have been repeated this morning by your counsel, and at that time you refused to answer those questions, and you tell us this morning you refused based on the fact that you did not have advice of counsel, and you did not know the names of all the organizations that might be listed on the Attorney General's list. • • •. I don't see why you had to have advice of counsel to say you did not belong to them.

"Applicant: Well, sir, I will give you an example. When I was interrogated in May of 1953, I mentioned that I was asked questions all at once, and some of the questions ran to this extent. To whom have you given the plans of Indiantown Gap Military Reservation? How long have you been a courier for the Soviet Union or for some of its satellites. My instant reaction was, what is going on here, you know, I hadn't realized that I was such a cloak and dagger personality. I saw that I was afraid, and really being fearful I did not wish to answer these questions for fear I might say something which was not actually the truth. (R. 71) • • •

"Counsel: Do you think if you had an opportunity to have carefully considered the questions and your answers to the questions, if you had done so in a calm and deliberate atmosphere rather than through fear, do you believe you would have answered as you did on the investigation report?

"Applicant: I think if I had time to I would have given more or less similar responses that I had given in the file with AGO. (R. 84-85) • • •

"Presiding Officer: What were you apprehensive of?

"Applicant: Well, sir, when someone walks in with a group

"a. In 1951 and 1952, were employed at Camp Lakeland which was reported to be a Communist operated camp.

"b. In 1949, were employed by the Detroit Urban League which was reported to be a subversive organization.

"c. In 1952, registered to vote in New York City with the American Labor Party. The American Labor Party is cited by the House Committee on Un-American Activities as being under Communist control in New York City.

"d. Solicited contributions of money for the defense of persons under indictment for violation of the Smith Act" (R. 3).

The letter also contained derogatory information with respect to petitioner's father and step-mother, who were alleged to have had "subversive" associations, and further stated that petitioner was alleged to have associated with persons who were Communists or Communist sympathizers (R. 3-4).

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of men, walks into the room here you had just been awakened, as I explained, by my Commanding Officer * * *

"Presiding Officer: Was your Commanding Officer present?

"Applicant: Yes, sir, I don't know how many gentlemen from the CID and a Lieutenant from G-2, a Sergeant with a .45 pistol strapped to his hip, and why someone should come into my room with weapons, I couldn't understand. I was apprehensive.

"Presiding Officer: You were apprehensive for fear they would shoot you?

"Applicant: I can't explain my subconscious reaction at the time.

"Presiding Officer: You were just apprehensive?

"Applicant: That is correct, sir." (R. 87)

On March 11, 1954, petitioner replied to the letter of allegations, stating that he was not then nor had he ever been a member of the Communist Party, and in answer to the derogatory information with respect to his father and step-mother, petitioner informed the Adjutant General that:

> "It is with deepest moral indignity coupled with a devout sense of filial piety, that I refuse to answer the derogatory statements made under allegations e and f. As neither my father nor step-mother are employed in any capacity by the federal government, I am led to the conclusion that derogatory information concerning them is wholly irrelevant to the case at hand" (R. 4-6).

The allegations in the letter of the Adjutant General dated February 9, 1954, related solely to lawful and legal activities and associations which petitioner carried on as part of his civilian life prior to the time of his induction except that (1) petitioner continued his association with his father and step-mother; and (2) in November 1952, he wrote a letter to two friends suggesting that they make financial contribution to assist the defense of two individuals who had been indicted for a violation of the "Smith Act" (R. 7-8, 100).

On April 2, 1954, the Adjutant General, by order of the Secretary of the Army, informed petitioner's Commanding Officer that the proposed discharge of petitioner as "disloyal or subversive" under the provisions of Army Regulation 615-370 had not been favorably considered. Instead, petitioner was to be assigned to non-sensitive duty in the lowest pay grade and retained in the Army establishment (R. 6-7). At the same time, petitioner was personally informed by the Adjutant General as follows:

"1. Reference is made to letter from this office dated 9 February 1954.

"2. The allegations in your case and your reply thereto have been reviewed in the Department of the Army. It has been determined that you will be retained in the service in your present grade, that you will not be promoted and that upon completion of your term of service you will be discharged with a type of discharge appropriate to the character of service you have rendered as of the date you are eligible for separation.

"BY ORDER OF THE SECRETARY OF THE ARMY"

(R. 7, 100).

However, 55 days later and on May 26, 1954, without notice to petitioner or providing him with a hearing, the Adjutant General, by order of respondent, rescinded the provisions of the previous order and informed petitioner's Commanding Officer that he would be discharged under the provisions of Army Regulation 615-370 and given an "Undesirable Discharge" (R. 7, 20). On June 2, 1954, petitioner was separated from the Army of the United States under the provisions of Army Regulation 615-370 at Transfer Point, Camp Pickett, Virginia, with an "Undesirable Discharge Certificate" (R. 13, 14).

It is conceded that the character and efficiency of petitioner's service in the Army of the United States from the date of his induction until the date of his discharge were excellent, and petitioner's service record bears two character and efficiency recommendations for excellent service (R. 9, 20, 101).[2]

[2] • • • [I]n its argument [the Government] concede[d] that it has never found [petitioner] either disloyal or loyal." (137 F. Supp. 475, 477.)

B. Proceedings Subsequent to Discharge

On June 8, 1954, petitioner applied to the Army Discharge Review Board to have the nature of his discharge certificate changed from Undesirable to Honorable. On October 22, 1954, petitioner appeared before the Army Discharge Review Board accompanied by counsel and testified under oath that he had never been a member of the Communist Party, or of any Communist cell or unit, or of any Communist organization, or of any organization that advocated the overthrow of the government, or of any organization which advocated a policy of approving or advocating the commission of acts of force or violence to deny other persons their rights under the Constitution, or of any organization which seeks to alter the form of government of the United States by unconstitutional means, or of any organization which, to his knowledge, had engaged in subversive activities of any kind or nature (R. 63-68). Petitioner further testified that he was then and had always been completely and unswervingly loyal to the government of the United States and would not hesitate to lay down his life in defense of the United States against any and all of its enemies whomsoever (R. 69, 101).

On November 15, 1954, petitioner was informed that his application for a change of his discharge certificate from Undesirable to Honorable had been denied (R. 10). Thereupon, petitioner applied to the Army Board for the Correction of Military Records, but on January 27, 1955, his appeal was denied (R. 10). On February 1, 1955, petitioner appealed to the Secretary of the Army, but no action was taken, and on May 2, 1955, petitioner commenced suit in the District Court for the District of Columbia.

C. Administrative Proceedings Subsequent to the Filing of Suit

Subsequent to the filing of the complaint, petitioner's counsel was informed by Hugh M. Milton II Assistant Secretary of the Army, that the Army Board for the Correction of Military Records had been ordered to undertake "a fresh evaluation of the entire case" (R. 51-52). On July 7, 1955, petitioner's counsel replied to Mr. Milton's letter and informed him that petitioner had commenced suit, testing the validity of petitioner's "Undesirable Discharge," but nevertheless offered to participate in a hearing before the Army Board for the Correction of Military Records (R. 52-53). On July 20, 1955, petitioner's counsel received another letter from Mr. Milton in which he stated that the Executive Secretary for the Army Board for the Correction of Military Records had scheduled a hearing for July 27, 1955, but that the Army could not agree that the discharge certificate was to be based on the character of the soldier's military service (R. 54). On July 25, 1955, petitioner's counsel informed Mr. Milton that appellant would not appear before the Army Board for the Correction of Military Records, inasmuch as a hearing before said board "would serve no useful purpose," since the Army and petitioner were in basic disagreement on the law relating to the issuance of discharge certificates (R. 55-56). On November 10, 1955, the Assistant Secretary of the Army denied petitioner's application for a correction of his military record (R. 57).

D. Court Proceedings

On May 2, 1955, petitioner filed a complaint in the United States District Court for the District of Columbia, praying for a declaratory judgment declaring

invalid his "Undesirable Discharge" and for a declaration that the action of respondent was illegal and unconstitutional. An answer was filed on July 19, 1955. Thereafter, an order was entered granting petitioner's motion to amend his complaint by substituting Wilber M. Brucker in place of Robert T. Stevens as defendant in the within action. Defendant Brucker was appointed Secretary of the Army in place of defendant Stevens, who had resigned. It was stipulated by counsel that the answer which was filed was adopted by the substituted defendant.

After filing of the answer, petitioner and respondent cross-moved for summary judgment. On November 28, 1955, respondent was granted leave to amend his answer to allege that, while petitioner's discharge certificate recited that the authority for his discharge was Army Regulation 615-370, petitioner was in fact discharged under the authority of Department of Defense Directive 5210.9, dated April 7, 1954, and that, while respondent admitted that petitioner's service record was marked "excellent" as to character and efficiency for the periods November 12, 1952, to July 24, 1953, and August 2, 1953, to April 24, 1954, the balance of petitioner's service record was marked "Unknown" as to character and efficiency.[3] On January 24, 1956, the District Court below granted respondent's motion for summary judgment on the sole ground that the court had no jurisdiction to review respondent's action (R. 105). Jurisdiction of the cause in the District Court was based on Sections 11-305 and 11-306 of the District of Columbia Code, on 28 U.S.C., Sections 1331, 2201 (the Declaratory

[3] However, the "Unknown" ratings are in no way disqualifying. See, AR 615-360, par. 8(b), Appendix, *infra*, p. 53.

Judgment Act), 2202 and on 5 U.S.C., Section 1009. Jurisdiction was also based on the First, Fifth and Sixth Amendments to the Constitution and on Articles I and III thereof.

On June 6, 1956, petitioner was notified by respondent that the character of his discharge was changed from "Undesirable" to "General (Under Honorable Conditions)." Thereupon, respondent filed a memorandum in the Court of Appeals suggesting mootness, which was denied by order of the Court of Appeals on August 17, 1956. On January 31, 1957, the Court of Appeals, by a 2-1 vote, affirmed the decision of the District Court (243 F. 2d 613), Judge Bazelon dissenting (*Id.*, at pp. 622-27).

SUMMARY OF ARGUMENT

Petitioner was inducted into the Army under the Universal Military Training & Service Act of 1948. After nineteen months of active military service, during which he received "excellent" ratings both as to character and efficiency, he was separated from the Army, without notice or hearing, and furnished an "Undesirable Discharge Certificate."[4] Since a discharge is a formal, final judgment by the government on the military record of a soldier, we think it basic that a soldier has a right to an honorable discharge if his military record merits it, and that he cannot be held to answer, in the consideration of his discharge, for matters extraneous to that record. Traditional and established Army policy makes it evident that the character of a military dis-

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[4] On April 11, 1956, the Army upgraded petitioner's discharge certificate from "Undesirable" to "General, under honorable conditions." (243 F. 2d 613, 623, n. 2.)

charge certificate is rooted in and fashioned from the conduct of a soldier during his time of service. And while the discharge certificate is issued by the military, the district court readily recognized that it has tangible and practical consequences in civilian life. The District Judge said: "To an honorable discharge accrue property rights, civil rights, and community respect and honor. * * * Conversely, one receiving an adverse discharge certificate must expect to encounter substantial prejudice in civilian life." (137 F. Supp. 475, 478.) Nevertheless the decision of the Court of Appeals permits the Army to stigmatize an inductee as a "security risk" for having engaged, while in civilian life, in constitutionally-protected and non-criminal conduct and associations (243 F. 2d 613, 620). Inasmuch as Department of Defense Directive 5210.9 affects the discharge certificates of thousands of young Americans inducted into the Armed Forces, and countless others previously released to the inactive reserve, the decision below deprives millions of young Americans (with excellent military records) of honorable discharge certificates, whenever it is asserted in the name of "security" that they are unsuitable for retention in the military establishment.

The issues which this Court is asked to decide arise from Department of Defense Directive 5210.9, establishing the "Military Personnel Security Program" under the authority of Section 4(b) of the Universal Military Training & Service Act, 62 Stat. 606, 50 U.S.C. App. § 454(b). Or, as stated by Judge Bazelon in his dissent below:

> "* * * whether the Universal Military Training & Service Act * * *, 62 Stat. 606, 50 U.S.C. § 454(b), pursuant to which Directive 5210.9 was promul-

gated, authorizes issuance of less than an 'honorable discharge' certificate, in the circumstances of this case." 243 F. 2d 613, at p. 627.

On the major questions below, the Court of Appeals was divided. Petitioner contends, with Judge Bazelon, that the majority erred. Petitioner's challenge is premised on the assertion that a soldier's right to a military discharge certificate accurately reflecting the character of his military service may be judicially protected from arbitrary encroachment by the military, and that a man who serves in the Army with a rating of "excellent" cannot be furnished a discharge certificate (for non-criminal, constitutionally-protected conduct occurring primarily, if not exclusively, prior to induction), which, by reflecting more than a record of military service, brings reproach and dishonor in civilian life, and extinguishes his right to valuable veterans' benefits.

I

The district court denied petitioner relief solely because the District Judge believed he lacked jurisdiction to review the issuance of petitioner's discharge certificate (137 F. Supp. 475, 478). The decision of the district court, as well as the majority opinion of the court below were based on *Gentila* v. *Pace* (C.A.D.C.), 193 F. 2d 924, cert. den. 342 U.S. 943. However, this very question was left unanswered by this Court in *Patterson* v. *Lamb*, 329 U.S. 539, 542.[5] When it is considered that a discharge certificate establishes a *valuable status* conferring "property rights, civil rights, and com-

[5] This was the view of Judge Youngdahl in the District Court (137 F. Supp. 475, 478, n. 4), Judge Bazelon in the dissent below (243 F. 2d, at p. 627), and the late Judge Frank in *Schustack* v. *Herren* (2 Cir.), 234 F. 2d 134, 135, n. 1.

munity respect and honor," we think it evident that the district court had jurisdiction to review respondent's action (1) if arbitrary, capricious, or clearly erroneous as a matter of law, absent clear and unequivocal Congressional language to the contrary; (2) if constitutional rights have been invaded; and (3) if the challenged administrative action was bottomed on an unconstitutional, invalidly authorized or *ultra vires* administrative regulation. Moreover, even if the district court lacked jurisdiction to interfere with respondent's discretion and was unable to compel him to issue petitioner an "honorable discharge" certificate, it had ample jurisdiction to declare invalid and unconstitutional respondent's action which resulted in petitioner's less than "honorable discharge" for unconstitutional and invalid reasons.

II

Department of Defense Directive 5210.9, under which petitioner allegedly received his less than "honorable discharge" was invalidly authorized, *ultra vires* and void. While Congress may have authorized the Secretary of Defense to remove "security risks" from the Armed Forces, Congress did not, and could not, authorize him or the Secretary of the Army or anyone else, to stigmatize an inductee for life with a less than "honorable discharge" certificate by reason of constitutionally-protected and non-criminal conduct extraneous to the character of the actual military service the soldier performed.

III

Respondent's action violated the First, Fifth and Sixth Amendments to the Constitution. In this connection, the Court will note that the constitutional

issues are relevant, not to petitioner's separation from the Army Establishment, but to his stigmatization for life with a less than "honorable discharge" (a "badge of infamy") for alleged "subversive" conduct and associations, and the manner in which the destruction of his good name and personal honor was accomplished. Here, at least in part, the issue is petitioner's right to freedom from government defamation. The less than "honorable discharge" imposed on petitioner for being a "security risk" is the imposition of "punishment" under the Sixth Amendment, which requires all the safeguards of a judicial trial. This is especially true in the instant case, since not only are petitioner's job opportunities and reputation seriously impaired, but his right to valuable veterans' benefits completely extinguished.

Rights to freedom of thought, association and belief cannot be infringed by government action defaming and dishonoring an individual who has exercised them, especially when such action cannot be justified in the national security interest. The constitutional protection of the First and Fifth Amendments are applicable, not to petitioner's separation from the Army Establishment, but to the stigmatization of his record of military service, which, on other than political considerations, warranted an "honorable discharge." Such action was also arbitrary, and constitutes a denial of "substantive due process."

ARGUMENT

I

THE DISTRICT COURT HAD JURISDICTION TO REVIEW THE ACTION OF RESPONDENT

The majority ruling below denying jurisdiction to review petitioner's less than "honorable discharge" was based on that court's prior ruling in *Gentila* v. *Pace* (C.A.D.C.), 193 F. 2d 924, cert. den. 342 U.S. 942.[6] We think the court below has construed too broadly its ruling in *Gentila* and has construed too narrowly the scope of judicial review in cases of this character. Cf. *Peters* v. *Hobby*, 349 U.S. 331, 347.

In 1944, Congress created the Army Discharge Review Board, 58 Stat. 286, 38 U.S.C. 693h. Thereafter, it authorized establishment of the Army Board for the Correction of Military Records, 60 Stat. 837, 5 U.S.C. 191a. These statutes made determinations of the Army Discharge Review Board "final, subject only to review by the Secretary of the Army," 58 Stat. 286, 38 U.S.C. 696h; and determinations of the Army Board for the Correction of Military Records "final and conclusive on all officers of the Government except when procured by means of fraud," 60 Stat. 837, 5 U.S.C. 191a. The scope of judicial review of the military's action in issuing discharge certificates has not yet been authoritatively decided by this Court. The precise question posed by the instant case was left open in

[6] It was also based in part on *Orloff* v. *Willoughby*, 345 U.S. 83, where this Court held that a doctor lawfully inducted into the Army could not review his specific duty assignments by *habeas corpus proceedings*. (*Id.*, at p. 93.) However, when Congress subsequently enacted legislation providing that doctors were to serve in the Army in a commissioned status, the holding in *Orloff*, did not preclude judicial review. See, *Nelson* v. *Peckham* (4 Cir.), 210 F. 2d 574.

Patterson v. *Lamb*, 329 U.S. 539, where Mr. Justice Black stated:

> "Whether and to what extent the courts have power to review or control the Department's action in fixing the type of discharge certificate issued to soldiers is a question we need not here determine." *Id.*, at p. 542.

A. As to Questions of Law and Arbitrary and Capricious Administrative Action

In *Gentila*, *supra*, which involved a "dishonorable discharge" for desertion which the veteran was seeking to have set aside, alleging insanity at the time of desertion, the Court of Appeals held that Congress had precluded review of the Army Discharge Review Board's "erroneous findings of fact." Judge Edgerton stated:

> "At the very least, we think the statute intends that merely erroneous findings of fact by the Discharge Review Board shall not be revised by a court." *Id.*, 193 F. 2d, at p. 927.

However, when it is considered that here, the district court said: "[T]he discharge certificate * * * has tangible and practical consequences in civilian life. To an Honorable discharge accrue property rights, civil rights, and community respect and honor * * * [but] one receiving an adverse discharge certificate must expect to encounter substantial prejudice in civilian life" (137 F. Supp. 475, 478); it becomes evident, absent clear and unequivocal Congressional language to the contrary, that arbitrary, capricious, or clearly erroneous action is reviewable. Cf. *McGrath* v. *Kristensen*, 340 U.S. 162, 169; *Dismuke* v. *United States*, 297 U.S. 167, 172.

If for example, Congress had said, as it did with respect to veterans' benefits, that the administrative determination is "final and conclusive" * * * and * * * no court of the United States shall have jurisdiction to review * * * such [determination]," respondent's position in this respect would be considerably strengthened. See, *Longernecker* v. *Higley* (C.A.D.C.), 229 F. 2d 27, 28.[7] However, where Congress says that proceedings of the Army Discharge Review Board are "final, subject only to review by the Secretary of the Army," 58 Stat. 286, 38 U.S.C. 693h, and proceedings before the Army Board for the Correction of Military Records are "final and conclusive on all officers of the government * * *," 60 Stat. 837, 5 U.S.C. 191a, we are faced with exactly the same situation as that involved in *United States* v. *Williams*, 278 U.S. 255. In *Williams*, the statute, which concerned adjusted compensation for veterans, provided: "The decisions of the Secretary of War * * * and the Director, on all matters within their respective jurisdictions under the provisions of this Act * * * shall be final and conclusive." In upholding the Director's decision, a unanimous Court held that the administrative decision "is final, at least unless it be wholly without evidential support, or wholly dependent upon a question of law, or clearly arbitrary or capricious" (*Id.*, at pp. 257-8). In *Estep* v. *United States*, 327 U.S. 114, the statute provided that the classifications made by local draft boards "shall be final except when an appeal is authorized in accordance with such rules * * * as the President may prescribe." This Court held that the classification

[7] But cf. *Burns* v. *Wilson*, 346 U.S. 137, 142; *St. Joseph Stockyards Co.* v. *United States*, 298 U.S. 38, 52; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 140.

could be overturned when it had "no basis in fact" (*Id.*, at p. 122). In *Sicurella* v. *United States*, 348 U.S. 385, this Court later held that the draft board's classification was subject to review when "erroneous as a matter of law" (*Id.*, at p. 391), and in *Simmons* v. *United States*, 348 U.S. 397 and *Gonzales* v. *United States*, 348 U.S. 407, it held that the draft boards' classifications could not be upheld when the procedures used were "unfair."

Moreover, Congress has guaranteed soldiers "certificates of discharge" upon their separation from the Army Establishment, 64 Stat. 145, 10 U.S.C. 652a, the purpose of which is to "record the separation from the military service and to specify the character of service rendered during the period covered by the discharge." AR 615-375, *Par.* (2)(*b*). Thus, in petitioner's case, the issue is one of law. Judge Bazelon states the problem clearly:

> "The issue [petitioner] raises is one of law: Whether [respondent] may withhold an honorable discharge from a soldier whose conduct and efficiency ratings have never been less than 'excellent,' even assuming the correctness of all the information [respondent] relies upon. That claim being 'wholly dependent upon a question of law' it is within the jurisdiction of the District Court * * * Nothing in *Gentila* v. *Pace*, *supra*, is to the contrary. *Nor can I accept it as settled (either by this court or the Supreme Court) that courts may not in circumstances like these review the issuance of a less than honorable discharge.*" 243 F. 2d 613, at pp. 626-7. [Emphasis supplied.]

Since this Court has said that "the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial ques-

tions," *Sterling* v. *Constantin*, 287 U.S. 378, 401, we think it clear that a soldier's statutory right to a discharge certificate accurately reflecting the character of his service *in the Army* is subject to judicial protection. Cf. *Patterson* v. *Lamb*, 329 U.S. 539, 545.[8]

Furthermore, while it is true that petitioner demanded relief requiring respondent to issue him an "honorable discharge" certificate (R. 11), in the first instance he demands relief declaring invalid and unconstitutional the less than "honorable discharge" issued him for non-criminal and constitutionally-protected conduct extraneous to the character of his actual military service (R. 11, 25-26). Thus, even if we assume, *arguendo*, that the district court lacked jurisdiction to interfere with respondent's discretion and compel him to issue petitioner an "honorable discharge" certificate, it had ample jurisdiction to declare invalid and unconstitutional respondent's action which resulted in petitioner's less than "honorable discharge" for unconstitutional and invalid reasons. See, *e.g.*, *Perkins* v. *Elg*, 307 U.S. 325, 349-350. As Judge Bazelon's dissent makes clear:

> "That [petitioner] seeks, in addition to a declaration that the discharge given him was void, an order that he be given an honorable discharge does not, in my view, deprive the District Court Court of jurisdiction. If, upon review, the discharge given [petitioner] is declared to be void, we must assume that the Secretary would issue a discharge which is not void * * *. Moreover, if the District Court finds the denial of an honorable discharge to rest on legally insufficient grounds, it

[8] See also: *Judicial Review of Army Discharge Procedures*, 9 Stanford L. Rev. 170-182, (Dec., 1956).

may, at least, enjoin a denial for such reasons." 243 F. 2d 613, at p. 627.

B. As to Invalidly Authorized and Ultra Vires Administrative Action

Even in those cases ordinarily free from judicial scrutiny, or where Congress has said that administrative action is "final," judicial review may be had where the action challenged is bottomed on an unconstitutional, invalidly authorized, or *ultra vires* administrative regulation. See, *Stark* v. *Wickard*, 321 U.S. 288, 309-310; *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 140, 157. Such is petitioner's contention here. Since petitioner contends that Department of Defense Directive 5210.9, issued April 7, 1954 (which respondent claims was the authority for his action in the instant case) is unconstitutional and *ultra vires* (Point II, *infra*), the district court had ample jurisdiction to declare that the Directive, under which respondent's action was taken, was invalid, unconstitutional and void. To paraphrase the words of Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123:

> "The objection to judicial [review] of an unauthorized exercise of powers is not weighty." *Id.*, at p. 157.

C. As to Constitutional Issues

The district court recognized the basic constitutional issue posed by this case: "We assume without question that the military cannot try a man for alleged criminal conduct committed prior to his entry into service. Does it not equally offend our traditional con-

cept of justice that a man who serves the military with a rating of excellent can be dismissed by it without being found disloyal, for non-criminal conduct which occurred primarily, if not exclusively, prior to induction, and can be furnished a discharge certificate which, by reflecting more than a record of military service, brings reproach and dishonor in civilian life?" (137 F. Supp. 475, 478). We think, therefore, the right to judicial review is clear. See, *e.g.*, Davis, *"Administrative Law,"* pp. 861-862. The classic statement of this principle was enunciated by the late Mr. Justice Brandeis:

> "When dealing with constitutional rights (as distinguished from privileges accorded by the Government * * *) there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it." Concurring in *St. Joseph Stockyards Co.* v. *United States,* 298 U.S. 38, at p. 77.

In *Burns* v. *Wilson,* 346 U.S. 137, the statute involved, Article 76 of the Uniform Code of Military Justice, provided that "* * * the proceedings * * * of courts-martial * * * and all dismissals and discharges * * * pursuant to sentences by courts-martial * * * *shall be final and conclusive; and * * * binding upon all * * * courts * * * of the United States* * * *.*" 64 Stat. 132, 50 U.S.C. 663 (emphasis supplied). Nevertheless, this Court held that "* * * the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers * * * from crude injustices * * *." *Id.*, at p. 142. The crudeness of the injustice involved in the instant case may be seen from the fact that if, prior to

induction, Harmon had been a convicted felon, rather than the son of a man "reported to be a member of the Communist Party" (R. 3), he would have received an "honorable discharge." See, *Hearings, Subcommittee on Constitutional Rights, Senate Judiciary Committee, pursuant to S. Res. 94,* 84th Cong., 2d Sess., November 18, 21, 1955, pp. 361, 431, 437, 439.

It is evident, therefore, that the holding in *Gentila* v. *Pace* (C.A.D.C.), 193 F. 2d 924, is limited by three exceptions, and that judicial review of the discharge certificate may be had (1) with respect to all questions of law; (2) where constitutional rights have been invaded; and (3) where the discharge certificate is issued pursuant to an unconstitutional or invalidly authorized administrative regulation.

II

DEPARTMENT OF DEFENSE DIRECTIVE 5210.9 WAS INVALIDLY AUTHORIZED, ULTRA VIRES, AND VOID

The Universal Military Training & Service Act authorizes the Secretary of Defense to prescribe *procedures* for the various Armed Services, in providing for the discharge of persons inducted under the Universal Military Training & Service Act. 62 Stat. 606, 50 U.S.C. App. 454(b). Congress also authorized the Secretary of the Army to establish procedures for the discharge of individuals from the Army prior to the expiration of their normal terms of service, 64 Stat. 145, 10 U.S.C. 652a. Purporting to act in accordance with this statutory authority, the Secretary of Defense issued Department of Defense Directive 5210.9 on April 7, 1954. The Directive provides that the standard for retention in the Armed Services shall be that retention shall not be inconsistent with the interests

of national security. *Directive, Par. VII(A)* (R. 36). The Directive further provides that the character of the separation certificate of the individual not retained *"shall be predicated upon the gravity of the reasonably substantiated information in derogation." Directive, Par. VIII(F)5* (R. 43).

Petitioner concedes that the Directive, to the extent it requires the removal of any soldier from the Army where retention is "not clearly consistent with the interests of national security" is validly authorized. 62 Stat. 606, 50 U.S.C. App. 454(b). But to the extent the Directive requires that the character of the soldier's separation certificate *"shall be predicated upon the gravity of the reasonably substantiated information in derogation,"* petitioner contends that it was not validly authorized, and was *ultra vires*, unconstitutional and void. Stated another way: While Congress may have authorized the Secretary of Defense to remove "security risks" from the Armed Forces, Congress did not, and could not, authorize him or the Secretary of the Army, or anyone else, to stigmatize an inductee for life with a less than "honorable discharge" by reason of constitutionally-protected pre-induction associations and activities which had nothing to do with the character of the actual military service the soldier performed.[9]

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[9] Rowland Watts, a leading authority in the field, points out:

> "This ['security'] purpose does not include the right to stigmatize a man for life for pre-induction activities which have nothing to do with the character of service he has rendered in the Army. * * * The Army has lost sight of the purpose of security within the Armed Forces. It has lost sight of its own declared policy. It has lost sight of the material with which it is dealing. * * * This 'material,' that we are considering, is young men in their late teens or early twenties and the period

The Universal Military Training & Service Act is based on the policy "that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy." 62 Stat. 604, 50 U.S.C. App. 451(c). Such a "fair and just" system of selection could not in a democratic state include a political test. And it does not, so far as the Selective Service System is concerned. Men are selected quantitatively upon Armed Forces requisitions of need in accordance with legal restrictions upon the size of the military establishment. They are selected

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of their lives that we are considering is, roughly, from fifteen to twenty years of age. There are many Juvenile or Youth Courts which grant 'youthful offender' treatment to a boy who commits a serious crime during the great part of this period. No criminal record no life handicap is created. Not so the Army. It brands a man for his non-criminal, perfectly legitimate, activities at the age of fifteen. In one case, it has threatened to brand him for his alleged associations at the age of eight. It threatens to brand a man for the accident of having been born into a politically-unacceptable family. It threatens to brand him if he marries a girl whose family is politically unacceptable. This 'branding' is not a theoretical thing. A man with an 'Undesirable' discharge from the Army has little hope of getting an industrial job or any job with a productive future. * * * There was the day when the Army would 'eliminate' a person whose security status is questioned by giving him a discharge based 'on the character of service he had rendered.' But no more. * * * It is inconceivable that the Congress intended to delegate to the Army political and social control over every young man subject to the Selective Service law from the dawn of his mature understanding until he approaches thirty. Yet that is the effect of the Army's application of what it considers to be the law." Watts, "*The Draftee and Internal Security, A Study of the Army Military Personnel Security Program*" (New York, 1955), pp. 6-9.

qualitatively upon just and clearly defined criteria for classification and generally fair provisions for hearing and appeal. But just because the Selective Service System has declared a person eligible for, and liable to induction, does not mean that he will be inducted. The Army exercises its veto power over the selection at the point of induction and thereafter. The Army reserves the right to reject anyone it sees fit for whatever reason it sees fit. What is pertinent here, however, is not the validity of the political criteria employed by the Army in making such rejections after induction, but the validity of such criteria in stigmatizing a record of military service which, on other than political considerations, warrants an "honorable discharge." Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 139-140, 160; *Wieman* v. *Updegraff*, 344 U.S. 183, 190-191.

Ordinarily, subject to the exception spelled out in the Department of Defense Directive:

> "An honorable discharge certificate will be furnished when the individual meets the following qualifications
>
> (1) Has character ratings of at least 'very good.'
>
> (2) Has efficiency ratings of at least 'excellent.'
>
> (3) Has not been convicted by a general court-martial.
>
> (4) Has not been convicted more than once by a special court-martial."
>
> *AR 615-360, Par. 8a.* Appendix, *infra*, at pp. 52-53.

An "Honorable Discharge" is a badge of honor, but it is limited to time and place and the particular character

of the military service rendered. It is not a certification that a man has not been a rogue in civilian life or that he will not become one after he is discharged. The nature and history of the military discharge certificate amply supports this conclusion.

A. The History of the Military Discharge Certificate

Ever since 1776 the Army has been required to issue a certificate of discharge to every soldier finally separated from the military service. Winthrop, *"Military Law and Precedents."* 961 (2d Ed., 1920). In 1788, the Secretary of War was vested with authority to prescribe the conditions under which the discharge should be issued (Winthrop, *op. cit., supra*, at p. 973), and this authority was continued through various reenactments of the Articles of War until the enactment of the Uniform Code of Military Justice in 1950, when by reenactment without material change the authority was vested in the Secretary of the Army by the Act of May 5, 1950, 64 Stat. 145, 10 U.S.C. 652a. Neither the present statute nor its predecessors defined the manner in which the Secretary was to exercise his discretion in regard to the issuance of discharge certificates. However, traditional Army discharge policy[10]

[10] To our knowledge, the first historical precedent was established by President Lincoln in 1864 in the case of *E. W. Andrews*, Adjutant to the Commander of the Defenses of Baltimore. President Lincoln's action in the *Andrews* case is recorded by Carl Sandburg, as follows: "Stanton the next day ordered that Andrews be mustered out of the service, no reason assigned, no questions asked Andrews. Word came to Andrews that Stanton, on hearing of Andrews' standing before an audience and saying he would vote for McClellan, raged and spoke threats of what he would do to Andrews. * * * Having heard the case the President gave his opinion: 'Well, that's no reason. Andrews has as good a right to hold on to his Democracy, if he chooses, as Stanton has to throw

has always required the discharge certificate to reflect the actual character of the military service rendered. Cf. *Patterson* v. *Lamb*, 329 U.S. 539, 545; *Davis* v. *Woodring* (C.A.D.C.), 111 F. 2d 523, 525. Moreover, the Army regulation interpreting the Act of May 5, 1950, 64 Stat. 145, 10 U.S.C. 652a, states that the purpose of the discharge certificate "* * * is to specify the character of service rendered *during the period covered by the discharge.*" *AR 615-375, Par. 2(b).*

As early as 1869, the Attorney General ruled:

> "Regularly, an officer or soldier, upon his discharge from the military service, is entitled to an honorable discharge, unless he is under sentence of dishonorable dismissal, or unless he has been convicted of an infamous offense and is sentenced to punishment therefore during the remainder of his term of service, or of conduct reflecting upon his military career, such as cowardice, etc., with either of which conditions an honorable discharge would be incompatible." *13 Op. Atty. Gen. 16.*

Thereafter, in 1886, the Attorney General ruled:

> "Where a person entered the military service in August, 1862, as a volunteer, to serve for three years, and subsequently deserted, but afterwards voluntarily returned to service under the President's proclamation (of pardon) of March 11,

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his overboard. If I should muster out all my generals who avow themselves Democrats there would be a sad thinning out of commanding officers in the army. No, when the military duties of a soldier are fully and faithfully performed, he can manage his politics in his own way; we've no more to do with them than with his religion. Tell this officer he can return to his post * * * Supporting General McClellan for the Presidency is no violation of army regulations, and as a question of taste of choosing between him and Ae, well I'm the longest, but he's better looking." Sandburg, *III, Lincoln, The War-Years*, pp. 294-296.

> 1865, and was mustered out of service along with his company July 2, 1865, * * * the time which elapsed between his desertion and his return should not be credited to him in a discharge or otherwise, but he is entitled to have his actual service credited to him in an honorable discharge." *18 Op. Atty. Gen. 427.*

Again, in 1918, the Army's Judge Advocate General ruled:

> "A soldier who was dishonorably discharged in a previous enlistment was inducted in the service during the present emergency and served honestly and faithfully. Under such circumstances he is entitled to an Honorable Discharge at the end of his present service. *A bad record in a prior enlistment is immaterial in considering the character of the discharge to be granted from his present enlistment." (Dig. Op., J. A. G. (1912-1930). Section 271, p. 128, No. 220.89, Nov. 30 1918).* [Emphasis supplied.]

And, more recently, in 1954, former Secretary of the Army Stevens stated:

> "The traditional policy of the Army has been that the discharge given should reflect the service rendered. In other words, a man whose conduct has been faithful and honest *during the time in the service* would be entitled to separation under honorable conditions, notwithstanding what his conduct may have been prior to entering the service." *Hearings, Senate Armed Services Committee on S. 3096,* 83d Cong. 2d Sess., March 18, 1954, at p. 75. [Emphasis supplied.]

This is not only the traditional policy, but is the current policy in all other than "security risk" cases. AR 615-360, which is the Army regulation setting forth

the general provisions for discharge of enlisted personnel (including inductees), states in paragraph 7:

> "Because the type of discharge may significantly influence the individual's civilian rights and eligibility for benefits provided by law, it is essential that all pertinent factors be considered so that *the type of discharge will reflect accurately the nature of service rendered.*" [Emphasis supplied.]

Thus, the controlling statute defining respondent's authority over discharges, 64 Stat. 145, 10 U.S.C. 652a, reenacted by Congress without material change in 1950, incorporates within its terms traditional Army policy and the interpretive rulings of the Attorney General and the Army's Judge Advocate General under the pre-existing "Articles of War." See, *e.g.*, *United States* v. *Cerecedo Hermanos*, 209 U.S. 337, 339; *Commissioner* v. *Flowers*, 326 U.S. 465, 469. Nevertheless, the majority below held that the Army is not required to give an honorable discharge "to an enlisted man when it finds, on the basis of pre-induction activities, that his presence in the armed forces is not consistent with the national security." (243 F. 2d 613, at p. 620). We agree that respondent is authorized to establish regulations for the discharge of servicemen prior to the expiration of their normal terms of service. We agree that respondent is authorized to separate petitioner from the Army establishment for any reason deemed appropriate, including reasons of "national security." But while the Army may change the *grounds* for discharge, Congress has required that the facts regarding the *nature of the military service* be accurately set forth in the *type* of discharge certificate issued. Since former Private Harmon's service record

bears both character and efficiency ratings of at least "excellent,"[11] the discharge certificate was required to read: "Honorable Discharge."

B. The Nature of the Military Discharge Certificate

The military discharge certificate confers a valuable status, for it is "* * * a final judgment passed by the Government upon the entire military record of the soldier, and an authoritative declaration by it * * *," *United States* v. *Kelly*, 15 Wall. 34. Moreover it has conclusive effect on many civilian rights, both under federal and state law. *Fitchburg* v. *Lunnenberg*, 102 Mass. 358; *Cohen* v. *Mitchell*, 69 F. Supp. 54, aff'd (C.A.D.C.), 160 F. 2d 915, aff'd. 333 U.S. 411.[12] Indeed, in the case at bar, the district court stated: "To an honorable discharge accrue property rights, civil rights and community respect and honor" (137 F. Supp. 475, 478). Moreover, the Army recognizes the penal nature of the "undesirable" discharge[13] and this reality has not gone unnoticed by the judiciary. See, *e.g.*, *United States ex rel. Robinson* v. *Keating* (D.C. Ill.), 121 F. Supp. 447, 478-479; *Bernstein* v. *Herren* (D.C., S.D.N.Y.), 136 F. Supp. 493, 496.

[11] Respondent's suggestion below, (*Appellee's Br.*, pp. 4, 18-19, 28) that the "unknown" ratings on petitioner's service record militate in some way against his entitlement to an 'honorable discharge' is spurious and misleading. Army Regulations specifically provide that "[r]atings of 'unknown' and ratings for periods of less than two months are not disqualifying." *AR 615-360, par. 8b.* Accordingly, petitioner's entitlement to an "*honorable discharge*" by reason of the only "known" ratings on his service record, which are marked "excellent", both as to character and efficiency, is clear. See, *AR 615-360, par. 8a.*

[12] See, *Judicial Review of Army Discharge Procedures*, 9 Stanford L. Rev. 160, 178-9, n. 45 (Dec., 1956).

[13] *Ibid.*

Although the discharge certificate proffered petitioner has been "upgraded" from the "undesirable discharge" issued June 2, 1954 (243 F. 2d 613, 623, n. 2), a "general (under honorable conditions) discharge" is not an "honorable discharge". See, *AR 615-360, par.'s 7-9* (Appendix, *infra*, pp. 52-54). While a "general discharge" does not automatically deprive petitioner of Federal veterans' benefits, he will nonetheless be deprived of various and substantial benefits provided veterans by the State of New York. For example, only veterans holding "honorable discharge" certificates or their wives, widows and minor children may be entitled to certain burial benefits, *N. Y. Gen. Mun. L.*, § 148; the children of only those veterans holding "honorable discharge" certificates may be entitled to state educational scholarships, *N. Y. Educ. L.*, § 609; only veterans holding "honorable discharge" certificates may be entitled to retire at a younger age than others from the school system, *N. Y. Mil. L.*, § 245; and only "honorable discharge" certificates or "honorable service" certificates may be recorded so as to put public officials on notice of the facts set forth therein, *N. Y. Mil. L.*, § 250. To say, as does respondent, that petitioner would not be injured by the award of a "general discharge (under honorable conditions)," rather than an "honorable discharge," is to disregard the plain and unmistakable provisions of applicable state statutes and the tangible benefits for which they provide.[14]

But more important than the loss of the tangible benefits to which we have adverted is the stigma at-

[14] In this connection, it will be noted that the New York statutes make a marked distinction between an "honorable discharge" and a discharge "under honorable conditions." See, *e.g.*, and compare *N. Y. Educ. L.*, § 608 with *N. Y. Educ. L.* § 609. Cf. *Ops. Atty. Gen.* (N. Y.), 51 St. Dept. 381, 391 (1934).

tached to anything other than an "honorable discharge." To say, as does respondent, that no stigma attaches to the "general (under honorable conditions) discharge" is to hide from reality. Or, as Judge Bazelon put it in his dissent below:

> "But whatever may be said of the technical legal equivalence or difference between the two types of discharge, from a real-life point of view they are vastly different. The portion of our population holding honorable discharge certificates from the armed services is now so great that an adverse reflection is inherent in a certificate which is other than 'honorable.' This is, of course, confirmed by the statement of [respondent's] counsel in oral argument that 'every soldier gets an honorable discharge unless there is some blemish on his record on account of which he receives a discharge other than honorable.' " 243 F. 2d 613, at p. 625.

These facts have been recognized by the recent decision in *Schustack* v. *Herren* (2 Cir.), 234 F. 2d 134, where the late Judge Jerome Frank noted plaintiff's argument that a "less than honorable discharge may have important adverse effects on a veteran's eligibility for various benefits under federal and state law,[15] and on his success in obtaining private or governmental employment.[16] * * * Besides this direct pecuniary harm, it involves a social stigma likely to harm plaintiff substantially. * * * Such effects may be aggravated by the requirement that the discharge papers of persons who do not complete their normal tour of duty, but are separated pursuant to AR 604-10 * * *, contain the statement 'AR 604-10 applies,' thus publicly proclaiming

[15] *Id.*, 234 F. 2d 135, n. 2.

[16] *Id.*, 234 F. 2d 135, n. 3.

that the Army considers such persons to be security risks." *Id.*, 234 F. 2d, at p. 135.

In the case at bar, if we assume *arguendo* that the words "AR 604-10 applies" will not appear on petitioner's corrected discharge certificate (R. 114), respondent, in the words of Judge Frank, will not have "aggravated" the "direct pecuniary harm" and the "social stigma" otherwise caused by the proffered "general discharge." However, the absence of the words "AR 604-10 applies" on petitioner's discharge certificate means only that, instead of publicly proclaiming him a "security risk," the Army says petitioner is either militarily inept, a homosexual, disloyal, or, perhaps, subversive.[17] In any event, the various comments made by Senators and officials of the Department of Defense during the *Hearings* before the *Senate Committee on Armed Services on S. 3096*, 83rd Cong., 2d Sess., March 18, 24 April 1, 8, 1954, bear striking witness to the *substandard* character of the "general discharge." See, *Hearings*, *id.*, at pp. 44, 45.

[17] This was made clear during the hearings before the Senate Sub-Committee on Constitutional Rights on the 18th day of November, 1955:

"Private Ross: I believe it had subversives and disloyal, because I looked that up. I know it had them. But I think it also had homosexuals, and so forth.

"Mr. Hocker: So that anybody who reads that paper—

"Private Ross: Will get the impression—

"Mr. Hocker: And then reads the certificate you give him, will have the choice of deciding whether you are subversive or disloyal or homosexual?

"Private Ross: That is right." *Hearings, Sub-Committee on Constitutional Rights, Senate Judiciary Committee, pursuant to S. Res. 91, 84th Cong., 2d Sess.* p. 442.

74, 75, 76, 128, 132, 133, 152, 153. As Senator Kefauver aptly stated:

> "Some might say that that doesn't mean much, but if they go to apply for a position or a job, and it is * * * any kind of discharge other than honorable, ordinarily they may as well not apply because they are not going to get a job. You can do all the explaining in the world, but there isn't a chance, if it doesn't say 'honorable.' " *Id.*, at p. 153.

In the dissent below, Judge Bazelon pointed out that "[i]t may well be, as [respondent] states, that none of the benefits available to discharged soldiers under federal law are withdrawn from the holder of such a 'general' discharge as this. Many benefits are conferred, however, by the statutes of the State of New York, where [petitioner] resides, and those statutes all use the language 'honorable discharge' or 'honorably discharged.' Although the New York courts have not decided whether this excludes holders of a discharge entitled 'General (under honorable conditions),' the late Judge Frank of the Court of Appeals for the Second Circuit suggested that it would. * * * Nor is the new form of discharge defensible on the ground that the separation report does not on its face indicate that it was based on security consideration. The same observation could be made concerning the 'undesirable' discharge. In both instances, however, a person sufficiently interested to check army regulations would discover the 'security' character of the discharge." (243 F. 2d 613, at p. 625.).

In petitioner's case, the "general discharge" certificate inflicts even more damage. As a law student and prospective candidate for admission to the Bar of the

State of New York (R. 2), the character of the proffered certificate erects a serious obstacle to petitioner's prospective career (R. 116-117).[18] Solely because petitioner engaged in non-criminal, constitutionally-protected conduct (which occurred primarily, if not exclusively, prior to induction), he is proffered a "general discharge," although his exemplary record of military service clearly entitles him to an "honorable" one. See, *AR 615-360, par. 8a.* In such circumstances, and where the "general discharge" jeopardizes petitioner not only in his profession, his job opportunities and reputation, but also extinguishes his right to valuable veterans' benefits provided by the laws of New York, we think it clear that the nature of his proffered discharge certificate causes him serious injury.[19]

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[18] Cf. *Konigsberg* v. *State Bar of California*, 353 U.S. 252; *Schware* v. *Bar Examiners of New Mexico*, 353 U.S. 232; Brown & Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. of Chi. L. Rev. 480, (1953).

[19] Commenting on this very issue, the *Stanford Law Review* notes: "The Army has furnished ex-private Harmon with a 'general' discharge under honorable conditions, and the Government is now urging that the case has become moot. • • • With a minor exception giving preference to honorably discharged veterans in the appointment of federal court criers and bailiffs, 28 U.S.C. § 775 (1952), this will entitle him to the same federal veterans' benefits as he would have been entitled to under an 'honorable' discharge. • • • However, many state benefits hinge on an 'honorable' discharge. See Zearing v. Johnson, 10 Cal. App. 2d 654, 52 P. 2d 1019 (2d Dist. 1935); Horyley v. New York State Bonus Comm'n., 220 App. Div. 345, 221 N.Y. Supp. 548 (3d Dept. 1925). The plaintiff may suffer such losses in his home state. • • • The 'general' discharge by its very nature, and the report of separation since it indicates as authority for discharge the personnel security regulation, U.S. Army Reg. No. 604-10 Par. 19(b) will stigmatize him for life." *Judicial Review of Army Discharge Procedures*, 9 Stan. L. Rev. 170, 171 n. 4, (Dec., 1956).

C. The Necessity for Restrictive Construction.

This Court has repeatedly held that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score." *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401. See also: *United States* v. *Rumely*, 345 U.S. 41, 45. It also has held that Congressional enactments must be limited to "*the least possible power adequate to the end proposed.*" See, *Anderson* v. *Dunn*, 6 Wheat. 204, 231; *United States ex rel Toth* v. *Quarles*, 350 U.S. 11, 15-16. If, as contended by respondent, Department of Defense Directive 5210.9; *Par. VIII(F)5*, was validly authorized by the Universal Military Training & Service Act of 1948, 62 Stat. 606, 50 U.S.C. App. 454(b), and if respondent's action in the instant case was authorized by the Act of May 5, 1950, 64 Stat. 145, 10 U.S.C. 652a, those statutes are unconstitutional.

The court below held that inasmuch as petitioner conceded that the Army could discharge him on mere suspicion that he was a security risk, "it could include that consideration among the factors to be considered in determining the value of his services, and, consequently, in selecting the type of discharge to be given him." (243 F. 2d 613, at p. 620).[29] Accepting this

[29] Respondent's argument, apparently adopted by the majority below, that the Army's concern with "morale and discipline is sufficient justification * * * for its policy of not giving security risks the same award of honorable service given exemplary soldiers" (*Appellee's Br.* p. 24) is absurd. See, *e.g.*, testimony of Hugh M. Milton II, Assistant Secretary of the Army, *Hearings, Subcommittee on Constitutional Rights, Senate Judiciary Committee, pursuant to S. Res. 91*, 84th Cong., 2d Sess., November 22, 1955, pp. 529-536. The historical facts demonstrate that a man's parents, allegedly "subversive," or his political "state of mind," do not

assertion on its face, it is readily apparent that what Judge Prettyman is saying is that if, on the basis of non-criminal acts and associations extraneous to the character of petitioner's military service, the Army can determine that the petitioner's "state of mind" during his period of service was not a desirable one, then the Army has the right to visit upon petitioner a less than honorable discharge, whether or not that "state of mind" induced overt or affirmative acts considered derogatory in connection with his military duties. But cf. *American Communications Association* v. *Douds*, 339 U.S. 382, where the late Mr. Justice Jackson said "[t]hought control is a copyright of totalitarianism and we have no claim to it." *Id.*, at p. 442.

Accordingly, and in line with the settled policy of restrictive statutory construction to avoid unconstitutionality, to the extent that Department of Defense Directive 5210.9 requires the character of an inductee's discharge certificate, whenever retention in the service is deemed "inconsistent with the interests of national security," to be based "*on the gravity of the reasonably substantiated information in derogation*," (*Directive, Par. VIII(F)*5) we think this Court must

militate against his being an "exemplary soldier." A most cogent example during World War II was the 442nd Regimental Combat Team. This organization, which won a Presidential unit citation for heroism in combat in the European Theatre of Operations, was made up of Nisei, most of whose parents were imprisoned in detention camps during World War II because of suspected "disloyalty." While it may be inconceivable to the Secretary of Defense (*See, Hearings before the Senate Armed Services Committee on S. 3690*, 83rd Cong., 2d Sess., March 18, 1954, p. 44), these realistic "security risks" were given honorable discharges upon their separation from the military service "the same as the millions of fine men that have fought for our Nation and have given loyal service" (*Ibid.*).

hold the Directive to be invalidly authorized, *ultra vires*, and void.

III

THE ACTION OF RESPONDENT WAS IN VIOLATION OF THE FIRST, FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION

Petitioner does not complain of the fact of his separation from the Army. He complains only of the "badge of infamy" he must wear the rest of his life because of alleged "subversive" conduct and associations, and the manner in which the destruction of his good name and personal honor was accomplished. Cf. *Wieman* v. *Updegraff*, 344 U.S. 183, 191.[21]

A. With Respect to the Sixth Amendment

It has been clearly settled that executive action resulting in a determination that an organization or individual is disloyal, subversive or a "security risk" can-

[21] Respondent has admitted "that his action was taken without any hearing, without any confrontation or cross-examination of witnesses by [petitioner] and without 'a statement of the reasons [petitioner] was determined to be an undesirable' • • •" (R. 16). It must be noted that the constitutional issues in this case are relevant, not to petitioner's separation from the Army Establishment, but to his stigmatization for life with a less than "honorable discharge" for constitutionally protected and non-criminal conduct occurring primarily, if not exclusively, prior to induction. If the Army had furnished petitioner a discharge certificate accurately reflecting the nature of his military service, no "hearing" or other "procedural due process" would have been required. Here, as in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, the issue, at least in part, is petitioner's right to freedom from Government defamation. *Id.*, at pp. 139-140, 160. Thus respondent's action, resulting in petitioner's less than "honorable discharge," clearly violated "procedural due process." *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U.S. 292, 300; *Morgan* v. *United States*, 304 U.S. 1, 18; *Gonzales* v. *United States*, 348 U.S. 407; *Parker* v. *Lester* (9 Cir.), 227 F. 2d 708.

not be made without some sort of hearing. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123. In the case at bar, former Private Harmon could not have been given a less than "honorable discharge" without providing him all the safeguards of a judicial trial, or in the alternative, the safeguards of a General Court-Martial under the Uniform Code of Military Justice, 64 Stat. 108, *et seq.*, 50 U.S.C. 551, *et seq.* Cf. *United States* v. *Lovett*, 328 U.S. 303. In *Lovett*, this Court held that a *permanent* dismissal from government service for subversion or disloyalty is "punishment," and that due process of law requires that an accused employee be given all the safeguards of a judicial trial before it is imposed. None of these safeguards were provided Private Harmon. He wasn't even granted a hearing! It will be noted that respondent's action does not violate the Sixth Amendment unless it can be said that the administrative determination separating petitioner from the Army with a less than "honorable discharge" on the grounds of being "disloyal," "subversive," or a "security risk" inflicted punishment upon him without a judicial trial. "Punishment" is a prerequisite. Cf. *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716. In a different context, "punishment" has been defined as follows:

> "The theory upon which our political institutions rests is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of all these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and

> .can in no other wise be defined." *Cummings* v. *Missouri*, 4 Wall. 277, 321-322.

This Court will undoubtedly note that petitioner was discharged under the provisions of Department of Defense Directive 5210.9. Paragraph VIII(F)(6) of that Directive provides:

> "In the case of separation of any member of the Armed Services, under conditions outlined in the preceding subparagraph, the DD Form 214 (Report of Separation) will cite as authority the appropriate Armed Service directive under which separation is effected." (R. 43)

Respondent notwithstanding, petitioner has not yet received a "general (under honorable conditions) discharge." He has been offered one (R. 110-112). The DD Form 214 (Report of Separation) proffered petitioner does not contain the words "AR 604-10" in paragraph 8 thereof (R. 113). Nevertheless, the words "AR 604-10 SPN 82" are required to be cited in paragraph 8. See, *Army Regulation* (AR) 604-10, par. 19(b).[22] In other words, petitioner's "Official Report of Separation from the Armed Forces" is required by regulation to stigmatize petitioner as a "security

[22] Paragraph 19(b) of the Army's "security risk" directive (AR 604-10) provides:

> "The Report of Separation From the Armed Forces of the United States (DD Form 214) of members discharged under the provisions of these regulations will indicate in item 8: 'AR 604-10 APN 82.' The letter of separation and/or discharge certificate of officer and enlisted reservists not on active duty will indicate: 'AR 604-10 applies.' Members relieved from active duty or discharged prior to completion of an action under these regulations will have 'Paragraphs 9 and 20 (as appropriate), AR 615-120 applies' entered in item 38, DD Form 214."

risk." *Schustack* v. *Herren* (2 Cir.), 234 F. 2d 134, 135. Inasmuch as petitioner has not yet received the "general (under honorable conditions) discharge" proffered him on June 6, 1956, it must be presumed that respondent will correct this omission from petitioner's DD Form 214 in conformity with the requirements of Department of Defense Directive 5210.9, par. VIII C 3 (6); and AR 604-10, par. 19(b). See *Ramspeck* v. *Federal Trial Examiners Conference*, 345 U.S. 128, 142-143; *R. H. Stearns Co.* v. *United States*, 291 U.S. 54, 63; *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15.

Viewed in this light, an assertion that petitioner has not suffered "punishment" is little short of ludicrous, especially where, as here, Department of Defense Directive 5210.9 and AR 604-10 require petitioner's "Official Report of Separation from the Armed Forces of the United States" to bear the notation for all the world to see: "AR 604-10 [the security risk regulation] applies." In the context of popular opinion in this country today, it is difficult to conceive of a deeper stain, or greater infamy. *Wieman* v. *Updegraff*, 344 U.S. 183, 190-191. With a "General Discharge" identified as a discharge under security regulations, it permanently stigmatizes a man with the concomitant result that he is barred for life from major areas of gainful employment.[23] A determination that an in-

[23] Rowland Watts, a leading authority in the field, has said with regard to the "General Discharge Under Honorable Conditions," that:

"AR 615-360 states that, 'The effects of an honorable discharge and a general discharge are identical and entitle an individual so discharged to full rights and benefits.' While this is technically true under the letter of federal law, it is not always

dividual is a "security risk" now renders it impossible for him to obtain employment in the Federal Government, or in state or local government; opportunities in private employment are either drastically diminished or completely extinguished. In many professional fields, such a person must abandon his life's work. Specific industries, such as the maritime, or the motion picture industry, or other industries engaged in work on Government contracts, are closed to

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true under varying state laws and is generally not true as far as private employment is concerned. As the discharge certificate in these cases has typed on it '[AR 604-10] applies'—which only means 'Disloyal and Subversive'—it is an effective bar to all public employment, virtually all defense industry employment, and most other private employment where the discharge certificate has to be shown. It is generally recognized that a General discharge is 'sub-standard.' In the absence of the 'Disloyal and Subversive' identification, it is used in such cases as military ineptitude or minor manifestations of homosexual propensities. The Army is so aware of its lesser value that the regulations provide: 'Notwithstanding the foregoing criteria * * *, when disqualifying entries in the individual service record during current service are outweighed by subsequent honest and faithful service over a greater period of time, an honorable discharge may be furnished. * * * In addition, careful consideration will be given to the nature of the offenses and sentence adjudged by a court-martial in applying the provisions of *a*(3) and (4) above, and when, in the opinion of the officer effecting discharge, these have been not too serious and severe, and the remainder of the service in the enlistment has been such that an honorable discharge would have been granted had the conviction not occurred, an honorable discharge certificate may be awarded.' (AR 615-360, par. 8b.) * * * Yet the General discharge has become the general dumping ground for all those against whom security charges are brought although the charges have not been 'proved' even by the Army's dubious standards of proof. 'It is the Army's way of creating the label of 'Almost Subversive.'' Watts, "*The Draftee and Internal Security, A Study of the Army Military Personnel Security Program*," (New York, 1955), pp. 80-81.

him. Other industries unofficially refuse to admit him, and if he were to attempt to secure employment in a foreign country, he would find it difficult to secure a passport. On the personal level, his reputation is blighted and the social status of his family impaired. Marked for life, his reputation as well as his ability to earn a livelihood is seriously jeopardized. Indeed, so far as the public is concerned, the term "security risk" is synonymous with "traitor."[24]

B. With Respect to the First and Fifth Amendments

Petitioner's First Amendment rights were abridged when he was furnished a less than "honorable discharge" as a security risk. In *American Communications Association* v. *Douds*, 339 U.S. 382, Chief Justice Vinson stated:

> "But * * * the fact that no direct restraint or punishment is imposed on speech or assembly does not determine the * * * question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." *Id.*, at p. 402.

Petitioner's "identifying arm-band" is his less than "honorable discharge" certificate, worn for life by

[24] See, *e.g.*, *Hearings, Senate Sub-Committee, Committee on Post Office and Civil Service, pursuant to S. Res. 20*, 84th Cong., 1st Sess., June 3, 9, 23, August 30, 21, 1955 at pp. 67, 121-122, 130, 271, 550, 573, 599, 627. See also: *Hearings, Subcommittee on Constitutional Rights, Senate Judiciary Committee, pursuant to S. Res. 91*, 84th Cong. 2d Sess., November 18, 22, 1955, pp. 361-362, 393-394, 526-527.

reason of the exercise of his First Amendment rights. Furthermore, the *Douds* case specifically holds that a limitation on First Amendment guarantees is permissible only when that limitation finds justification in the safety of the community or the safety of the nation. Cf. *Cole* v. *Young*, 351 U.S. 536. But here, we think there is no justification in the interests of national security for furnishing petitioner a discharge certificate, which instead of reflecting his record of excellent military service, brings him reproach and dishonor in civilian life.[25] See, *e.g.*, *McTernan* v. *Rodgers* (D.C., Cal.), 113 F. Supp. 638, 640; *Lawson* v. *Housing Authority*, 270 Wis. 269, cert. den., 349 U.S. 941. Nevertheless, the majority below said: "Activity in the Communist movement now involves a possible conspiratorial participation dangerous to the security of this country * * *. Activity in the world Communist movement has long since passed the boundaries of mere political opinion. It may well make a man a security risk, and, as we have pointed out, the courts cannot compel the Army to retain a security risk in its service" (243 F. 2d 613, at p. 620). Whatever a "security risk" is, we agree that the courts cannot compel the Army to retain "one" in its service. *But we think this argument beside the point.* Petitioner took pains to make clear below that the First and Fifth Amendment issues of his case had nothing to do with his retention in or discharge from the military establishment. It was applicable only to the "badge of dishonor" worn for life because of legal acts and associations, and because he was the son of a man "reported to be a member of the

[25] 137 F. Supp. 475, at p. 478.

Communist Party" (R. 3). Our assertion is fortified by Judge Bazelon:

> "[Petitioner] does not challenge the [respondent's] power to remove him from the Army on mere suspicion that he is a security risk. But, whether or not the interests of national security justify dismissing a soldier on mere suspicion, [petitioner] claims that these interests are not served by branding such a soldier as a security risk as he passes through the gate." 243 F. 2d 613, at p. 626.[26]

The Army had the power to discharge Harmon if it was not satisfied to keep him in the service, but it could not discharge him and defame him at the same time.[27] If Harmon had engaged in "seditious conduct" while in the Army he could have been court-martialed under Article 94 of the Uniform Code of Military Justice, 64 Stat. 136, 50 U.S.C. 688, but he was not court-martialed, for he engaged in no wrong-

[26] In this connection, it is clear that respondent's action, in no way justifiable in the national security interest, was arbitrary, and thus a violation of petitioner's right to *substantive* "due process." *Wieman* v. *Updegraff*, 344 U.S. 183.

[27] Actually, the discharge certificate imposed on petitioner for being an alleged "security risk" is nothing other than "infamy," historically analogous to the Roman institution of "*Infamia*." Cf. *Ullman* v. *United States*, 350 U.S. 422, 449-454 (Douglas, J., dissenting). One noted legal historian has stated that *infamia* was "* * * a moral censure pronounced by a competent authority in the State on individual members of the community, as a result of certain actions which they had committed, or certain modes of life which they had pursued, this censure involving disqualification for certain rights both in public and in private law." *Greenridge*, "*Infamia*," [1894], p. 37. See also: Buckland, "*A Textbook of Roman Law From Augustus of Justinian*," (2d Ed. 1932) p. 91; Livingston, "*A System of Penal Law for the State of Louisiana*," (1833) p. 63.

doing while in the Army or prior to induction. Since petitioner's military service was unquestionably "honorable," because the character and efficiency of his military service was concededly "excellent" (*AR 615-360, Par. 3a*), respondent's action violated petitioner's rights under the First and Fifth Amendments. Cf. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX

Constitution

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes

Act of May 5, 1950, 64 Stat. 145, 10 U. S. C. 652a.

"No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said

service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial."

Section 4(b) of the Universal Military Training & Service Act of 1948, 62 Stat. 606, 50 U. S. C. App. 454(b).

"Each person inducted into the Armed Forces under the provisions of subsection (a) of this section shall serve on active training and service for a period of twenty four consecutive months, unless sooner released, transferred, or discharged in accordance with procedures prescribed by the Secretary of Defense (or the Secretary of the Treasury with respect to the United States Coast Guard) or as otherwise prescribed by subsection (d) of section 4 of this title [subsection (d) of this section]."

Act of June 22, 1944, 58 Stat. 286, 38 U. S. C. 693h:

"The Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Navy, after conference with the Administrator of Veterans' Affairs, are authorized and directed to establish in the Army, Air Force and Navy Departments, respectively, boards of review composed of five members each, whose duties shall be to review, on their own motion or upon the request of a former officer or enlisted man * * *, the type and nature of his discharge or dismissal, except a discharge or dismissal by reason of the sentence of a general court martial. Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person. Witnesses shall be permitted to present testimony either in person or by affidavit and the person requesting review shall be allowed to appear before such board in person or

by counsel * * * Such board shall have authority, except in the case of a discharge or dismissal by reason of the sentence of a general court martial, to change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board. The Articles of War and the Articles for the Government of the Navy are amended to authorize the Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Navy to establish such boards of review, the findings thereof to be final subject only to review by the Secretary of the Army, the Secretary of the Air Force, or the Secretary of the Navy, respectively * * * ".

Act of August 2, 1946, 60 Stat. 837, 5 U. S. C. 191a.

"(a) The Secretaries of the Army, Navy, and Air Force, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and corrections so made shall be final and conclusive on all officers of the Government except when procured by means of fraud * * * ".

Regulations

Army Regulation 615-375, Paragraph 4 (a) (b).

"The purpose of a discharge certificate is to record the separation of an individual from the military service and to specify the character of service rendered during the period covered by the discharge."

Army Regulation 615-360, Paragraphs (7) through (9).

"Factors Governing Issuance of Honorable and General Discharge Certificates

7. *General considerations.*—Because the type of discharge may significantly influence the individual's civilian rights and eligibility for benefits provided by law, it is essential that all pertinent factors be considered so that the type of discharge will reflect accurately the nature of service rendered. It is the policy of the Department of the Army to base evaluation of an individual's service and character on his over-all enlistment period rather than on any disqualifying entries in his service record during a particular portion of his current service. The effects of an honorable discharge and a general discharge are identical and entitle an individual so discharged to full rights and benefit. The undesirable discharge may or may not deprive the individual of veteran's benefits administered by the Veterans Administration and a determination by that agency is required in each individual case to fix the individual's rights. A dishonorable discharge deprives the individual of all veteran's benefits and may operate to deprive him of civil rights.

8. *Honorable discharge.* a. Except as provided in these regulations and pertinent regulations listed in paragraph 13, an honorable discharge certificate will be furnished when the individual meets the following qualifications:

(1) Has character ratings of at least 'very good.'

(2) Has efficiency ratings of at least 'excellent.'

(3) Has not been convicted by a general court-martial.

(4) Has not been convicted more than once by a special court martial."

b. Notwithstanding the foregoing criteria, when disqualifying entries in the individual's service record during current service are outweighed by subsequent honest and faithful service over a greater period of time, an honorable discharge may be furnished. Ratings of "unknown" and ratings for periods of less than 2 months are not disqualifying. (See par. 3-7a (2), SR 615-20-1.) In addition, careful consideration will be given to the nature of the offense and sentence adjudged by a court-martial in applying the provisions of a (3) and (4) above, and when, in the opinion of the officer effecting discharge, these have not been too serious and severe, and the remainder of the service in the enlistment has been such that an honorable discharge would have been granted had the conviction not occurred, an honorable discharge certificate may be awarded.

2. *General discharge.* Individuals discharged under honorable conditions which do not qualify them for an honorable discharge will be furnished a general discharge, except as provided below. Officers effecting discharge are authorized and required to deviate from this criteria and furnish an honorable discharge when, after considering all aspects of the individual's service, it appears that furnishing a general discharge would not be in the best interest of the service or the individual. Specifically, the above criteria may be deviated from in the following instances:

a. Regardless of previous record, an individual who has received a decoration or award, including a commendation ribbon or a lifesaving medal, will, provided his record subsequent to the act for which he was decorated, awarded, or commended would so entitle him, be furnished an honorable discharge.

b. An individual being separated with severance pay under the AR and SR 680-450 series will normally be furnished an honorable discharge.

c. When it is apparent from inconsistent entries in the service record that furnishing a general discharge is not warranted, an honorable discharge may be furnished (i. e., when ratings given are disqualifying but promotion with no subsequent reduction was given during period covered or when disqualifying ratings were given but individual was favorably considered for Good Conduct Medal at the same time).

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 80

JOHN HENRY HARMON, III, *Petitioner*,

v.

WILBER M. BRUCKER, Individually and as Secretary of the Department of the Army, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITIONER'S REPLY BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 80

JOHN HENRY HARMON, III, *Petitioner,*

v.

WILBER M. BRUCKER, Individually and as Secretary of the Department of the Army, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITIONER'S REPLY BRIEF

INTRODUCTORY STATEMENT

Respondent's brief proceeds in large measure on an avoidance of the basic question before this Court. That question, as Judge Bazelon said in his dissent below, is "whether the Universal Military Training and Service Act of 1948, 62 Stat. 606, 50 U.S.C.A. App. § 454 (b), pursuant to which Directive 5210.9 was promulgated, authorizes issuance of less than an honorable discharge certificate in the circumstances of this case."[1] That is the basic question for decision by this

[1] 243 F.2d 613, at p. 627.

Court, and while respondent includes it in his counter-statement of "Questions Presented,"[2] he spends a major portion of his brief avoiding it. Rather, in two separated sections of his brief, respondent argues that his action did not invade any of petitioner's legally protected rights (*Res. Br.* 58-70), and that the character of petitioner's discharge certificate is not subject to judicial review. *Res. Br.* 22-58. We think the basic question is put in clearer focus if these two issues are discussed together.

I.

THE DISTRICT COURT HAD JURISDICTION TO REVIEW RESPONDENT'S ACTION

The argument that the District Court has no jurisdiction to review the issuance of a less-than "Honorable Discharge" not only overlooks the nature and character of the military discharge certificate, it also fails to consider the valuable status which an "Honorable Discharge" confers. Moreover, the contention that none of petitioner's legally protected rights were invaded completely ignores respondent's destruction of that *status* as well as his stigmatization of petitioner's record of military service—a record which, on the other than political considerations, warranted an "Honorable Discharge."

A. Petitioner Has Suffered Injury to a Legally Protected Right.

Respondent's argument that no legal injury was caused by the issuance of a "General Discharge Under Honorable Conditions" (*Res. Br.* 58-70) was twice rejected by the court below. The first time was on

[2] *Res. Br.* 2.

August 17, 1956 when it denied respondent's suggestion of mootness (R. 120); the second time, as Judge Bazelon points out, when in dealing with the question of jurisdiction, "it [seemingly] rejected the contention that there is no longer a judicially cognizable case or controversy" (243 F.2d 613, 625, ftn. 7) Cf. *Friedman* v. *International Association of Machinists* (C.A.D.C.), 220 F.2d 808, 810, cert. den., 350 U.S. 824. Indeed, since Judge Prettyman's majority opinion extensively discusses the constitutional issues (243 F.2d 613, 620-622), it is apparent that both majority and minority below found a sufficient *locus standi* in this case. Moreover it "seems nothing short of an absurdity for the Government to contend, even with respect to a general discharge, that distinctions made with all the formality incident to a military discharge * * * really make no difference so far as the serviceman is concerned." Jones, *Jurisdiction Of The Federal Courts To Review The Character Of Military Administrative Discharges,* 57 Col. L. Rev. 917, 928 (1957).

In addition, however, respondent asserts that the omission of the words, "AR 604-10 applies" from Harmon's discharge certificate and DD Form 214 shows that petitioner has not been stigmatized as a "security

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[3] This assertion is spurious. As we pointed out at page 43 of our main brief, since "petitioner has not yet received the 'general (under honorable conditions) discharge' proffered him on June 6, 1956, it must be presumed that respondent will correct this omission from petitioner's DD Form 214 [and insert the words: 'AR 604-10 applies'] in conformity with the requirements of Department of Defense Directive 5210.9, Par. VIII(F)(6), and AR 604-10, Par. 19(b). See, *Ramspeck* v. *Federal Trial Examiners Conference,* 345 U.S. 128, 142-143; *R. H. Stearns Co.* v. *United States,* 291 U.S. 54, 63; *United States* v. *Chemical Foundation,* 272 U.S. 1, 14-15." Rather than meet this issue, respondent makes the bald assertion that the presumption of administrative regularity does not apply

risk.'"[3] And in any event, he argues, there is nothing inherently defamatory in a "security risk" discharge from the military service. *Res. Br.* 64-70. According to respondent, such a determination cannot be equated to a determination excluding one from public employment on disloyalty grounds,[4] or to the designation of an organization as "communist,"[5] or to a determination that a reasonable doubt exists as to an employee's loyalty,[6] and he points to his concession in the district court "that he has never found [petitioner] either disloyal or loyal." *Res. Br.* 65, ftn. 49a. But, in *Cole* v. *Young*, 351 U.S. 536, the Government also conceded that Cole, whose continued retention in Federal employment was "not clearly consistent with the interests of national security" under Executive Order 10450, "was not charged with being disloyal and that none of the charges implied any disloyalty on his part."[7] There, too, the Government claimed that an employee removed from Federal employment as a "security risk"

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when an administrative regulation is challenged as illegal. *Res. Br.* 64, ftn. 49. But unless this Court strikes down Department of Defense Directive 5210.9, Par. VIII (F)(5) and AR 604-10, both the Directive and the Regulation remain in full force and effect, and a mistake on a discharge certificate can always be corrected. *13 Op. Atty. Gen. 201* (1870). Indeed, since both the Directive and the regulation have been upheld as valid the presumption that respondent will correct his prior omission from petitioner's DD Form 214 to conform with the requirements of Department of Defense Directive 5210.9, Par. VIII (F)(6), and AR 604-10, Par. 19(b) cannot be avoided. *Pet. Br.* 42-45.

[4] *Wieman* v. *Updegraff*, 344 U.S. 183, at pp. 190-191.

[5] *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, at p. 125.

[6] *Peters* v. *Hobby*, 349 U.S. 331, at p. 347.

[7] *Cole* v. *Young*, 351 U.S. 536, *Petitioner's Brief*, No. 442, October Term, 1955, p. 5.

does not wear the badge of infamy.[8] Nevertheless, this Court said that "*in view of the stigma attached to persons dismissed on loyalty grounds*, the need for procedural safeguards seems even greater than in other cases, and we will not lightly assume that Congress intended to take away those safeguards in the absence of some overriding necessity * * *." *Cole* v. *Young*, *supra*, at pp. 546-547 (emphasis supplied). The very same is true here; we have already pointed out that insofar as the public is concerned the term "security risk" is synonymous with "traitor." *Pet. Br.* 45.[9]

When respondent likens the action petitioner complains of to those cases in which "the courts have refused to grant relief to civil servants dismissed on charges involving serious criminal misconduct" (Res. Br. 65-68), he points up the basic fallacy of his case. A military discharge certificate is not a "Notification of Personnel Action" which terminates the services of a federal employee from his job. So much is clear from both the nature and history of the military discharge certificate and the valuable status which it confers. *Pet. Br.* 28-36. He further compounds this error when he fails to distinguish between the validity of Department of Defense Directive, Par. VII (A), providing that retention in the armed services shall not be inconsistent with the interests of national secu-

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[8] *Op. cit. supra*, *Respondent's Brief*, No. 442, October Term, 1955, p. 65.

[9] See also, *Watkins* v. *United States*, 354 U.S. 178, 77 S. Ct. 1173, 1184; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 77 S. Ct. 1203, 1210; *Hearings, Senate Subcommittee on Constitutional Rights, Pursuant to S. Res. 94*, 84th Cong. 2d Sess., November 23, 1955, at pp. 627-628; Jones, *Jurisdiction Of The Federal Courts To Review The Character Of Military Administrative Discharges*, 57 Col. L. Rev. 917, 925, 928-929 (1957).

rity, and the invalidity of Par. VIII (F)(5) of the Directive, which provides that the character of the separation certificate of the individual so removed *"shall be predicated upon the gravity of the reasonably substantiated information in derogation."* And finally, when respondent urges that petitioner's claim of actionable defamation rests upon a valid determination made *within the scope of his authority*, and that such action is not injury to "a legally protected right" (*Res. Br.* 67-68), he necessarily joins issue on the basic question before this Court, *i.e.*, "whether the Universal Military Training and Service Act of 1948, 62 Stat. 606, 50 U.S.C.A. App. §454(b), pursuant to which Directive 5210.9 was promulgated, authorizes issuance of less than an 'Honorable Discharge' certificate in the circumstances of this case." Respondent cannot avoid a determination of this question by asserting that the District Court lacked jurisdiction to review the invalidly authorized and unconstitutional action taken in the case at bar.[9a]

B. Congress Has Not Precluded Judicial Review.

Since an "Honorable Discharge" is "a formal, final judgment passed by the Government upon the entire

[9a] Jurisdiction of the cause in the District Court was based on Sections 11-305 and 11-306 of the District of Columbia Code (as well as on 28 U.S.C. 1331, 2201, 2202 and 5 U.S.C. 109) (R. 2). Thus, if respondent was not authorized to issue petitioner a less-than "Honorable Discharge" certificate for constitutionally protected conduct extraneous to the character of his military service, *mandamus* will lie to compel the issuance of a discharge certificate in accordance with the provisions of *AR 615-360, Par. 8a.* See, *Work* v. *United States ex rel. Rives*, 267 U.S. 175, 177; Jones, *Jurisdiction Of The Federal Courts To Review The Character Of Military Administrative Discharges*, 57 Col. L. Rev. 917, 939-940, 956-957 (1957).

military record of the soldier, and an authoritative declaration by it that he ha[s] left the service in a status of honor * * *,'"[10] the discharge certificate confers a *valuable status.* See, *United States ex rel Hirshberg* v. *Cooke,* 336 U.S. 210. Thus, even if the District Court had no jurisdiction to interfere with respondent's discretion, or to compel him to issue petitioner an "Honorable Discharge" certificate, it undoubtedly had jurisdiction to declare invalid the issuance of a less-than "Honorable Discharge" certificate for unconstitutional and invalid reasons. See, *Perkins* v. *Elg,* 307 U.S. 325, 349-350; *McGrath* v. *Kristensen,* 340 U.S. 162, 169-171.[11] The legal authorities cited in support of respondent's extensive argument that Congress has never given district courts jurisdiction to review the issuance of military discharge certificates (*Res. Br.* 42-58) in no

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[10] *United States* v. *Kelly,* 15 Wall. 34, 82 U.S. 34, 36; *In re Fong Chew Chung* (9 Cir.), 149 F.2d 904, 906; *Ex parte Dranier* (D.C., Cal.), 65 F. Supp. 410, 411, affd. (9 Cir.), 158 F.2d 981. In the case at bar the District Judge said: "While the discharge certificate is issued by the military, it has tangible and practical consequences in civilian life. To an honorable discharge accrue property rights, civil rights, and community respect and honor. United States ex rel. Roberson v. Keating, D.C. Ill. 1949, 121 F.Supp. 477. Conversely, one receiving an adverse discharge certificate must expect to encounter substantial prejudice in civilian life." (137 F. Supp. 475, 478) See also, *Bernstein* v. *Herren* (D.C., SDNY), 136 F.Supp. 493, 496-497.

[11] In his concurring opinion *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, Mr. Justice Jackson pointed out: "Ordinary dismissals from government service which violate no fixed tenure concern only the Executive branch, and courts will not review such discretionary action. * * * [But the] *fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally. Id.,* at p. 185. (Emphasis supplied.) See also, *Rudder* v. *United States* (C.A. D.C.), 226 F.2d 51, 53; *Shachtman* v. *Dulles* (C.A. D.C.), 225 F.2d 938, 940-941.

wise support his conclusion. While some of the authorities indicate that the scope of the District Court's review is a limited one.[12] arbitrary or capricious administrative action, or action bottomed on an unconstitutional or *ultra vires* administrative regulation is historically a judicial preserve.[13]

Respondent argues that the legislative history of both Section 301 of the Servicemen's Readjustment Act of 1944, 58 Stat. 286, 38 U.S.C. 693h, and Section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 837, 5 U.S.C. 191a demonstrate a Congressional intention to preclude judicial review of the action taken here *Res. Br.* 36-42. He repeatedly relies on the holding of the Court below in *Gentila* v. *Pace* (C.A.D.C.), 193 F. 2d 924, 927, cert. den. 342 U.S. 943, and contends that judicial review in the instant case would "increase the workload of the courts by a substantial percentage, an increase which Congress did not contemplate." *Res. Br.* 39. However, we think it clear that (1) Section 301 of the Servicemen's Readjustment Act of 1944, 58 Stat. 286, 38 U.S.C. 693h was not intended "to make the decisions of [the Army Discharge Review Board] any *more* nonreviewable than they otherwise would have been under prior law," (2) the

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[12] *E.g., Patterson* v. *Lamb*, 329 U.S. 539, 542; *Denby* v. *Berry* (C.A. D.C.), 279F. 317, 320, rev'd. on other grounds, 263 U.S. 29; *Davis* v. *Woodring* (C.A. D.C.), 111 F.2d 523, 525.

[13] *Pet. Br.* 17-24. Although the Court of Appeals for the Second Circuit did not pass on the question of judicial review in *Schustack* v. *Herren* (2 Cir.), 234 F.2d 134, at p. 136, it was undoubtedly the view of the late Judge Jerome Frank that the District Court did have jurisdiction to review the issuance of a less than "Honorable Discharge" certificate. See, *Michaelson* v. *Herren* (2 Cir.), 242 F.2d 693, 696, ftn. 6.

finality provision of Section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 837, 5 U.S.C. 191a "actually was enacted with the intention that * * * decisions of the [Army Board for the Correction of Military Records] adverse to the veteran should be subject to the fullest judicial review" and (3) Congress, fully aware that 15,000 ex-servicemen were then seeking correction of their military records, intended that "the courts of the United States should not be precluded from reviewing such cases under appropriate circumstances." See, Jones, *Jurisdiction Of The Federal Courts To Review The Character Of Military Administrative Discharges*, 57 Col. L. Rev. 917, 966-971 (1957).[13a] In any event, notwithstanding the "finality" provision of Section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 837, 5 U.S.C. 191a, the Court of Claims has repeatedly "reviewed" determinations of the Army Board for the Correction of Military Records when "arbitrary, capricious, or contrary to law." *Furlong* v. *United States* (Ct. Cl.), 152 F. Supp. 238, 241; *Propper* v. *United States* (Ct. Cl.), 154 F. Supp. 317, 325-327; *Wales* v. *United States* (Ct. Cl.), 130 F. Supp. 900, 904; *Gordon* v. *United States*, 129 Ct. Cl. 370, 121 F. Supp. 625, 629. And finally, Judge Bazelon, one of the three judges who sat on the panel that heard and decided the *Gentila* case, said in his dissent below:

[13a] Rather than extend the length of this reply brief by an extensive analysis of the legislative history of Section 301 of the Servicemen's Readjustment Act of 1944 and Section 207 of the Legislative Reorganization Act of 1946, counsel refers the Court to the complete and comprehensive analysis of the legislative history of those statutes in the *Columbia Law Review* article cited where the author has conclusively documented petitioner's assertion that Congress did not preclude judicial review of his case.

> "'Stripped of self-contradiction and legal conclusions, all that [Gentila's] complaint allege[d]' was that his dishonorable discharge for desertion rested upon 'an erroneous finding of fact' that he was mentally capable of forming an intent to desert. We held that 'merely erroneous findings of fact by the Discharge Review Board shall not be revised by a court.' * * * [But since petitioner's] claim [is] 'wholly dependent upon a question of law,' it is within the jurisdiction of the District Court. United States v. Williams, 1929, 278 U.S. 255, 257-58 * * *. Nothing in Gentila v. Pace, supra, is to the contrary." (243 F.2d 613, at pp. 626-7).

Accordingly, we think respondent's argument does not warrant serious consideration by this Court.

II.

DEPARTMENT OF DEFENSE DIRECTIVE 5210.9, PAR. VIII(F)(5) WAS INVALIDLY AUTHORIZED, ULTRA VIRES, AND VOID.

The Universal Military Training and Service Act of 1948, 62 Stat. 604, 50 U.S.C. App. 451, "is a comprehensive statute designed to provide an orderly, efficient and fair procedure to marshal the available manpower of the country, to impose a common obligation of military service on all physically fit young men." *United States* v. *Nugent*, 346 U.S. 1, 9. Section 4(b) of the Act provides that each person inducted into the armed forces thereunder shall serve on active training for a period of 24 consecutive months, "unless sooner released, transferred or discharged *in accordance with procedures prescribed by the Secretary of Defense* * * *." 62 Stat. 606, 50 U.S.C. App. 454(b). This authority was provided by Congress "in the general interest of sound and reasonable personnel man-

agement and policy" for the armed forces. *S. Rep. 1268 on S.2655*, 80th Cong., 2d Sess., p. 7 (1948). It was not designed "to delegate to the [military] political and social control over every young man subject to the Selective Service Law from the time of his mature understanding until he approaches thirty." Watts, *The Draftee and Internal Security, A Study of the Army Military Personnel Security Program* 9, (1955). "Yet, that is the effect of the Army's application of what it considers to be the law."[14]

The purpose of Department of Defense Directive 5210.9 was to extend "the critera for security programs established as national policy for *civilian personnel* by Executive Order 10450" to military personnel in the various Armed Services. *Directive, Par I (A) (1)* (R 34) [emphasis supplied]. Obviously, petitioner was not a civilian while in the Army. Equally certain is the fact that he was not a Government employee. Ever since the *Selective Draft Law Cases*, 245 U.S. 366, it has been held that induction for military service and other service incident thereto does not constitute involuntary servitude within the meaning of the Thirteenth Amendment. *Id.*, at p. 390. On the other hand, Executive Order 10450, 18 F.R. 2489, is based on the fundamental assumption that Government employment is a privilege and not a right. Cf. *Bailey* v. *Richardson* (C.A. D.C.), 182 F.2d 46, affd. by an equally divided court, 341 U.S. 918. But, if federal employment is a "privilege" and not a right, the conclusion that induction for military service does not constitute involuntary

[14] Watts, *Op. Cit., supra*, at p. 9. Cf. *Bernstein* v. *Herren* (D.C. SDNY), 136 F.Supp. 493, 496-499; see also, *Hearings, Senate Subcommittee on Constitutional Rights, Pursuant to S. Res. 94*, 84th Cong., 2d Sess., November 18, 21, 1955, at pp. 353-441, 465-534.

servitude can be justified only if the inductee is not a Government employee. Accordingly, the Department of Defense has made a fundamental error in attempting to adopt "the criteria for security programs established as national policy for *civilian personnel* by Executive Order 10450" to military personnel in the various Armed Services. *Directive, Par. I (A)(1)* (R. 34).[15] With this erroneous premise as a starting point, we can understand how respondent equates the issuance of a less-than "Honorable Discharge" certificate on charges involving constitutionally protected activities occurring prior to induction with dismissals of civil servants on charges involving serious criminal misconduct. *Res. Br.* 65-68. Under his theory it is simple to rationalize that if military service under the Universal Military Training and Service Act is a "privilege" like federal civilian employment, then a military discharge certificate is nothing more than a "Notification of Personnel Action" which terminates a federal employee from his job. But a military discharge certificate is not a "Notification of Personnel Action." It is "a formal, final judgment passed by the Government upon the entire military record of the soldier and an authoritative declaration by it that he [has] left the service in a status of honor * * *." *United States* v. *Kelly,* 15 Wall. 34, 82 U.S. 34, 36. The only reason respondent refuses to furnish an "Honorable Discharge" certificate to petitioner, a soldier with a record of military excellence, "is the

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[15] On April 8, 1954, Secretary of Defense Wilson said: "I think it is generally accepted and has been for many years, that serving your country in uniform is an honor and a privilege, and not a right." *Hearings, Senate Armed Services Committee on S. 3096,* 83d Cong., 2d Sess., p. 155. The Directive was issued on April 7, 1954. (R. 33).

Department's belief that, in the eyes of the public, the Honorable Discharge carries with it the Department's stamp of approval of the good character, trustworthiness and loyalty of the former serviceman, as well as an attestation that his performance was satisfactory in all significant respects." *Report of the Commission on Government Security*, 146 (1957). But prior to 1954 the Army never attempted to base the character of the discharge certificate on pre-induction conduct, or on constitutional activities extraneous to the character of the actual military service performed. Indeed, *AR 615-375*, Par. 2(b), the Army Regulation interpreting the Act of May 5, 1950, 64 Stat. 145, 10 U.S.C. 652a (a reenactment by Congress without material change of Article 108 of the Articles of War, 41 Stat. 809, 10 U.S.C. 1580,[16] specifically provides that the "purpose of a discharge certificate is to * * * *specify the character of service during the period covered by the discharge.*"[17] Clearly, therefore, respondent was not validly authorized to stigmatize petitioner for life with a less-than "Honorable Discharge" certificate by reason of constitutionally protected and non-criminal conduct extraneous to the character of his actual military service. Cf. *Federal Trade Commission* v. *Bunte Bros. Inc.*, 312 U.S. 349, 352.

Former Private Harmon was *inducted* into the Army on October 31, 1952; he was required by law to

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[16] *S. Rep. No. 486 on H.R. 4080*, 81st Cong. 1st Sess., pp. 34, 39 (1949)

[17] An "Honorable Discharge" is a badge of honor, but it is limited to time and place and the particular character of the military service rendered. It is not a certification that a man has not been a rogue in civilian life or that he will not become one after he is discharged. See, *Report of the Commission on Government Security*, 146-147 (1957).

become a member of the Armed Forces. He seeks no reinstatement to active or inactive duty; he seeks only to remove the badge of dishonor imposed by a less-than "Honorable Discharge" as a "security risk." Unlike *Bailey* v. *Richardson,* former Private Harmon seeks no reinstatement to Government employment; unlike *Bailey* v. *Richardson,* we are faced with no abstract claim of privilege to which no constitutional protection attaches. For petitioner's service in the Army, unlike Miss Bailey's federal job, was an *obligation,* not a privilege. Respondent was authorized to discharge Harmon if he was not satisfied to keep him in the Army, but he was not authorized to discharge him and defame him at the same time. We think traditional Army discharge policy, as reflected by the rulings of the Attorney General and the Army's Judge Advocate General interpreting the provisions of Article 108 of the Articles of War, 41 Stat. 809, 10 U.S.C. 1580 (*Pet. Br.* 29-32), was incorporated by Congress in Section 4(b) of the Universal Military Training and Service Act of 1948, 62 Stat. 606, 50 U.S.C. App. 454(b). Cf. *Duncan* v. *Kahanamoku,* 327 U.S. 304, 319-324. Accordingly, to the extent that Department of Defense Directive 5210.9 requires the character of an inductee's discharge certificate, whenever retention in the service is deemed "inconsistent with the interests of national security," to be based *"on the gravity of the reasonably substantiated information in derogation,"* [*Directive, Par. VIII(F)(5)*], this Court must hold the Directive invalidly authorized, *ultra vires,* and void. *Pet. Br.* 24-40. Were it otherwise, Section 4(b) of the Universal Military Training and Service Act would be unconstitutional. See, *Keegan* v. *United States,* 325 U.S. 478, 496-498, Black, J. Concurring; cf. *Reid* v.

Covert, 354 U.S. 1, 33; *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 22-23.

CONCLUSION

For the foregoing reasons the judgment of the court below should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 777

JOHN HENRY HARMON, III, PETITIONER

v.

WILBER M. BRUCKER, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 99–105) is reported at 137 F. Supp. 475. The opinions of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 33–57) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1957. The petition for a writ of certiorari was filed on February 15, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a person who is discharged from the Army as a security risk and receives a General Discharge under honorable conditions thereby suffers any legally remediable injury.

2. Whether the Secretary of the Army has statutory authority to prescribe a security risk program for military personnel and to issue a certificate of General Discharge under honorable conditions to personnel discharged thereunder.

3. Whether the discharge of petitioner violated any of his statutory or constitutional rights in such manner as to authorize or require the district court to compel a change in the character of the discharge.

4. Whether the district court had jurisdiction to review the discharge.

STATUTES AND REGULATION INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 19-21. Department of Defense Directive 5210.9 is set forth in the Record, pp. 33–45.

STATEMENT

Petitioner is a former private in the Army who was discharged by order of the Secretary of the Army in 1954 with an Undesirable Discharge (R. 13–14). He brought suit for a declaratory judgment that this action of the respondent was null, void, and illegal, and for a mandatory order directing the respondent to change the character of the discharge certificate to "Honorable."

Petitioner was inducted into the Army on October 31, 1952, under the Universal Military Training and Service Act, 50 U. S. C. App. 451, *et seq.* (R. 2–3).

On May 7, 1953, he was interrogated by military authorities concerning membership in, association with, or activity on behalf of the Communist Party and persons or organizations connected therewith, and his willingness to bear arms against Communist-dominated and influenced nations. Petitioner answered some of the questions and as to others invoked his privilege against self-incrimination (R. 91–98).

On February 9, 1954, the Adjutant General ordered petitioner to explain in writing certain information relevant to his security status which had been received by the Army. This information concerned petitioner's connection or associations in 1951 and 1952 with activities which were reported to be subversive or Communist-controlled; his registration in New York with the American Labor Party in 1952; his solicitation of contributions for the defense of persons under indictment for violations of the Smith Act; and reports that his father was a member of the Communist Party and that his stepmother associated with Communists or Communist sympathizers (R. 3–4).

On March 11, 1954, petitioner replied to this information. He acknowledged that he worked in 1951 and 1952 at Camp Lakeland, which was reported to be a Communist-operated camp, but asserted it was labelled as Communist-dominated by persons opposed to inter-racial relations. He also acknowledged employment in 1949 by the Detroit Urban League, reportedly a subversive organization, but asserted that he took the job because he needed summer employment and that he did not know the League as a subversive organization. Petitioner did not explicitly

acknowledge that in 1952 he registered to vote with the American Labor Party in New York, which the House Un-American Activities Committee had cited as being under Communist control, but asserted that it was a lawful political organization and that he had the right to vote for the party of his choice. He stated that he had solicited funds for the defense of persons under indictment for violation of the Smith Act, but asserted he had a constitutional right to do so. He refused to reply to the allegations that his father was a member of the Communist Party and of certain organizations on the Attorney General's list of subversive organizations and that his stepmother associated with persons who were Communists or Communist sympathizers, on the ground that such questions were irrelevant. He asserted that he had never been a member of the Communist Party, but stated that it was possible that he, as a public speaker, had been acquainted with Communists or Communist sympathizers (R. 4–6).

On April 2, 1954, petitioner was informed that the Army would not discharge him as "disloyal or subversive," but that he would be assigned to non-sensitive duties in the lowest pay grade, and that, upon completion of his term of service, he would be given a type of discharge appropriate to the character of the service he had rendered (R. 6–7). This determination was based upon the provisions of Army Regulations 615–370 which dealt with the retention of security risks in the Army (R. 29).

On April 7, 1954, the Secretary of Defense issued Department of Defense Directive 5210.9 (R. 33–45).

This directive provided for the modification of outstanding regulations of the armed services so as to apply to military personnel the criteria of the security program established for the government's civilian employees by Executive Order 10450 (April 27, 1953, 18 F. R. 2489). The standard prescribed by the directive for "retention within the Armed Services" was that on "all the available information" it appears that "retention is clearly consistent with the interests of national security" (R. 34, 36). The directive was accompanied by a memorandum from the Secretary of Defense directing that cases previously cleared be reviewed under the new standard (R. 32–33).

The Army thereupon reviewed petitioner's case and determined that his retention in the service was inconsistent with the interests of national security and that he should be discharged with an Undesirable Discharge (R. 30–31). On June 2, 1954, he was so discharged (R. 13, 14). The formal report of his separation erroneously cited Army Regulations 615–370 as the authority for the discharge (R. 14).

At the time of his separation, petitioner's service record was marked "excellent" as to character and efficiency for the periods of November 12, 1952, to July 24, 1953, and August 2, 1953 to April 24, 1954; it was marked "unknown" for the balance of his military service (R. 9, 99).

Immediately after his discharge, petitioner applied to the Army Discharge Review Board to have the character of his discharge changed from Undesirable to Honorable (R. 10). On October 22, 1954, he ap-

peared with counsel at a formal hearing before the Board at which he had the right to present evidence in his behalf, testify in person, or submit a written statement or brief (R. 63). Petitioner testified as the sole witness, giving in an expanded form essentially the same answers he had given the Adjutant General in writing before his discharge, and explaining the reasons he had refused to answer certain questions during his interrogation on May 7, 1953 (R. 63–90). The Army Discharge Review Board ruled against changing the character of petitioner's discharge (R. 10). He then applied to the Army Board for the Correction of Military Records for the same relief, but that Board also denied his application (*ibid.*).

Petitioner then made a direct request to the Secretary of the Army for the award of an Honorable Discharge (*ibid.*). The request was reviewed by an Assistant Secretary of the Army as delegate for respondent. On July 5, 1955, he referred it to the Army Board for the Correction of Military Records (R. 45–46). By letter of July 7, 1955, petitioner's counsel stated that he had no additional evidence to present (R. 52–53). The Assistant Secretary of the Army replied that the Board for the Correction of Military Records would consider all material evidence of record and inquired of counsel whether he intended to appear at the scheduled hearing (R. 54). On July 25, 1955, counsel for petitioner wrote that he would not appear at the hearing because he had no additional material to offer (R. 55–56). The Army Board for the Correction of Military Records then considered petitioner's request on the whole record

before it, and recommended to the Assistant Secretary that his discharge certificate not be changed. On November 10, 1955, after reviewing the matter under the standard of Department of Defense Directive 5210.9, the Assistant Secretary approved the Board's recommendation (R. 45–46).

Subsequent to this request to the Secretary of the Army, but prior to a final determination thereof, the instant action was commenced in the district court (R. 2). After filing of the complaint and answer, the present Secretary of the Army was substituted for his predecessor in office (R. 106). Both sides filed motions for summary judgment with supporting affidavits (R. 17–26, 28–51). The district court held that it had no jurisdiction to review, control or compel the granting of military discharge certificates, and it therefore denied petitioner's motion for summary judgment, granted respondent's motion, and dismissed the complaint (R. 105).

Petitioner appealed from this judgment and, while his appeal was pending, he was notified by The Adjutant General on June 6, 1956, that the character of his discharge was changed from "Undesirable" to "General (under honorable conditions)" (R. 110–111). This change was effected as the result of a review conducted by the Army Discharge Review Board of all military personnel security cases which were closed between November 10, 1948, and November 16, 1955. As a result of this review, petitioner's separation records have been changed to show a discharge under honorable conditions, and a new discharge certificate and report of separation, retroac-

tively reflecting a discharge under honorable conditions, have been furnished him (R. 113–114).

The court of appeals, by order of August 17, 1956, denied the respondent's suggestion that this change in the character of petitioner's discharge rendered the case moot (R. 120). Subsequently, the court, in an opinion by Judge Prettyman, affirmed the judgment of the district court, holding that petitioner had not been denied any statutory or constitutional rights, and that in the absence of such a denial the court did not have authority to review the exercise by the Secretary of the Army of his discretion to determine what type of discharge a soldier should be given (Pet. App. 33–57). Judge Bazelon dissented.

ARGUMENT

In our view, petitioner has suffered no legal injury by the issuance to him of a General Discharge certificate under honorable conditions, since there is no legally cognizable difference between that certificate and the Honorable Discharge which he seeks. In addition, the court below correctly stated and applied the limitations upon the scope of judicial review of, and control over, the issuance of particular types of military discharge certificates. The decision is in accord with the principles of previous decisions of this Court defining the appropriate degree of judicial supervision over actions of the military establishment with respect to military personnel. Furthermore, the result reached by the court of appeals accords with the manner in which other lower courts have resolved this precise issue and does not present any conflict of de-

cisions. Accordingly, there is no occasion for further review.

1. Whatever legal injury petitioner believes he has suffered must stem from differences recognized by law between the General Discharge and Honorable Discharge certificates. We submit, however, that there is no legally cognizable difference between them and that, therefore, petitioner has not suffered any injury for which judicial relief can be granted.

The effect of the change in the character of petitioner's discharge is to remove the disabilities which constituted the original basis for his claim of injury. He is now eligible for accrued pay, mustering-out pay, and all other veterans' benefits and gratuities provided by the federal government (see the Chart, Incidents of Discharge, R. 59). Neither the Department of the Army, the Veterans' Administration, nor any other federal agency administering veterans benefits distinguishes between the two types of certificates for these purposes. To the contrary, the Army has characterized the General Discharge and the Honorable Discharge as identical in effect. Paragraph 7 of Army Regulations 635–200 provides: "Both the honorable discharge and the general discharge entitle an individual so discharged to full rights and benefits."[1]

[1] The General Discharge certificate is issued where a soldier is to be separated under honorable conditions but does not qualify for an Honorable Discharge (Par. 9, AR 635–200). In addition to soldiers who have been given this type of discharge under the military personnel security program, the General Discharge is issued, *inter alia*, to soldiers discharged for inaptitude or unsuitability (Pars. 1–3, AR 635–209) or for undesirable habits and traits of character (Par. 7, AR 635–208).

Petitioner's eligibility for veterans' benefits under the laws of the State of New York, his domicile, depends, of course, upon that State's construction of its statutes conferring such benefits. It is entirely possible that the phrase "honorably discharged" which appears in some of these statutes would include a discharge under honorable conditions. See, *e. g.*, N. Y. Gen. Bus. Law, Sec. 32, McKinney Bk. 19; N. Y. Mil. Law, Sec. 245, McKinney Bk. 35. We know of no New York authority to the contrary. Indeed, it is highly probable that State officials will accord the same efficacy to a General Discharge as does the federal government. See *Horylev* v. *New York State Bonus Commission,* 220 App. Div. 345, 221 N. Y. S. 548. In any event, the mere possibility that petitioner will be denied state benefits because he has a General Discharge under honorable conditions is too speculative to constitute a basis for judicial intervention. Cf. *United Public Workers* v. *Mitchell,* 330 U. S. 75, 90.

Petitioner's claim of injury is primarily based on the social stigma and prejudice which he alleges will result from the issuance to him of a General Discharge. We do not believe that a claim of prejudice or embarrassment in private life resulting from the granting of the General Discharge, rather than an Honorable Discharge, constitutes a legally remediable injury. Moreover, the claim in this case is at most speculative, for petitioner has not demonstrated that such stigma will result or that the public makes a distinction. Petitioner now has a discharge certificate which is, in terms, under honorable conditions. The Honorable Discharge doubtless carries prestige which

the General Discharge lacks; in its own terms, the Honorable Discharge is "awarded as a testimonial of honest and faithful service." That difference does not mean that a stigma attaches to the General Discharge.

2. Petitioner was discharged from the Army as a security risk pursuant to Department of Defense Directive 5210.9, which established for the armed forces a security program patterned after that prescribed for civilian employees of the Government by Executive Order 10450 (R. 33–45). Congress has never prescribed the various types of military discharges or the conditions under which they are to be given. It has left that matter to the discretion of the Secretary of the Army. Thus, the statute in force at the time of petitioner's discharge (10 U. S. C. 652a) provides merely that no enlisted person shall be discharged prior to expiration of his term of service "except in the manner prescribed by the Secretary of the Department of the Army * * *" (Appendix, *infra*, p. 20).

The authority of the Secretary of the Army in this field is subject to the authority vested in the Secretary of Defense generally to direct and control the administration of the three armed services by their respective secretaries (5 U. S. C. 171a (c) (4)) and specifically to prescribe procedures for the discharge of an inductee prior to the expiration of his term of service (50 U. S. C. App. 451, 454 (b)). (Appendix, *infra*, p. 20). It is clear that these statutes authorized the Secretary of Defense to promulgate Department of Defense Directive 5210.9 and authorized the

Secretary of the Army to issue petitioner a General Discharge pursuant to that valid regulation. The statutory provisions are framed in broad discretionary terms and we know of nothing in their language or history which would indicate a congressional intent to limit the discharge authority of the military departments in the manner urged by petitioner.

Petitioner concedes that Directive 5210.9 was valid insofar as it required that security risks be separated from the military establishment (Pet. 13, 16, 17). He contends, however, that it was not authorized insofar as it required that the character of separation "shall be predicated upon the gravity of the reasonably substantiated information in derogation" (Pet. 16). But if the Army could determine whether or not petitioner was a security risk and could, on that basis, conclude that petitioner was not suitable for any military service whatsoever, it was within the discretion of the Secretary of Defense to include that factor in determining the value of his service and consequently the type of discharge certificate to be issued to him.

3. We believe that, in creating the Army Discharge Review Board (38 U. S. C. 693h) (Appendix, *infra*, pp. 19-20) and the Army Board for the Correction of Military Records (5 U. S. C. 191a) (Appendix, *infra*, p. 20), Congress has established a separate and complete system of review within the military establishment which furnishes the sole remedy for a soldier aggrieved by the character of his military discharge. Congress has provided that the findings of the Discharge Review Board shall be "final subject only to

review by the Secretary of the Army * * *" and that the corrections made by the Board for the Correction of Military Records "shall be final and conclusive on all officers of the Government * * *." Certainly, as noted by the court of appeals (Pet. App. 37), there is no statute which specifically authorizes further review in the courts.

But the court of appeals did not rest its decision on this proposition alone. It also considered petitioner's contention that judicial review was required since, as he argued, the effect of the Army's action was a deprivation of his constitutional rights.[2] The court concluded, correctly, we believe, that there was no such deprivation.

As argued above, petitioner has not suffered any legal injury by the issuance to him of a General Discharge under honorable conditions. Moreover, Department of Defense Directive 5210.9 was a regulation authorized by statute. As stated by the court of appeals (Pet. App. 37–38), "[n]o statute was misapplied in the process or the substance of the discharge. No statute directs or authorizes judicial review of Army discharges." Therefore, petitioner's argument "must rest upon constitutional grounds: that as a matter of due process of law or by some other constitutional requirement he was entitled to court review of the type of discharge which he should be given." The court went on to find that there is no constitutional basis for the relief which petitioner seeks (Pet. App. 41):

[2] It should be noted that Judge Bazelon, in his dissent, did not reach the merits of petitioner's claims, but, having concluded that the district court had jurisdiction to grant review, he urged that the case be remanded to that court for consideration of the merits (Pet. App. 57).

> * * * Reason, flowing from the doctrine of the separation of powers, dictates that in many fields the administrative discretion of the executive branch and the legislative discretion of the legislative branch be not subject to interference or review by the courts. In no field is this doctrine more pertinent and important than in the operation of the armed forces. Provisions for the establishment and operation of such forces necessary to the security of this country are wholly legislative matters, and the administration of those forces is the very essence of executive action. The Constitution so provides. Only in the most extreme cases can the judiciary interfere in this area. As a practicality the operation of military forces requires expeditious, sometimes instant, action and thus requires discipline. From the standpoint of the Army it is easy to see the disastrous effect upon discipline if the type of discharge which could be given an enlisted man were not within the power of the commanding officer or the Secretary, but were subject to litigation and to review and decision by a court wholly removed from the necessities of military affairs. As a further matter of practicality, from the standpoint of the courts review of such matters would impose an appalling burden, with which the courts are wholly unequipped to cope.

The court also pointed out that there was no denial of due process. Petitioner was given adequate notice and a hearing on the allegations against him. Later, in connection with a direct appeal to the Secretary of the Army, he was offered a second hearing which he declined, stating that he had no additional facts to

present (R. 55–56). With respect to substantive due process, "the consideration of pre-induction activity was not frivolous, arbitrary or discriminatory; it was based upon reasonable grounds" (Pet. App. 42). Petitioner was discharged because, upon all the evidence in his case, including his conduct prior to his military service, he was found to be a present security risk in the Army. As stated by this Court in *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716, 720, "Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment." It is imperative that those in the service be completely dependable; there must be no question as to their being security risks. In determining that question, inquiry necessarily is made as to their activities both before and after entry into the service. If it is determined that a serviceman is not trustworthy, he should be discharged from the service. Such a person is not entitled to the same type of discharge as one who is not a security risk. An honorable discharge must be earned. Should honorable discharges be awarded those determined to be security risks, equally with those about whom there is not the slightest question as to security, the morale and discipline of the Army would inevitably be impaired. As a security risk, the value of petitioner's military service is considerably lessened, and we do not believe that the decision of the Secretary to take that factor into con-

sideration in determining the character of petitioner's separation can be said to raise a question of substantive due process of law.[3]

4. Contrary to petitioner's assertion, the decision of the court below does not conflict with applicable decisions of this Court, but accords with the limitations this Court has placed on judicial control over the military department's administration of personnel affairs. Indeed, the cases cited by petitioner as being in conflict (Pet. 24) are not directly applicable for they are not concerned with the problem of the relationship of the judiciary to the military establishment.[4]

The decisions of this Court dealing with problems of internal military administration support the result reached below. Thus, this Court held in *Orloff* v.

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[3] Petitioner also argues that his rights under the Sixth Amendment and the First Amendment were violated. But the discharge of a soldier from the Army is not a criminal prosecution and the guaranties of the Sixth Amendment are not applicable. *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320. And it is difficult to see how petitioner's First Amendment right to freedom of speech could be abridged by the issuance to him of a General Discharge. Petitioner is certainly as free now to express his opinions and political views as he was before he was inducted into the Army. Petitioner relies on the opinion of this Court in *American Communications Association* v. *Douds*, 339 U. S. 382, for the proposition that the First Amendment may be violated by indirect restraints and punishment. But in upholding the validity of Section 9 (h) of the National Labor Relations Act, this Court stated (339 U. S. at 402–403): "But we have here no statute which is either frankly aimed at the suppression of dangerous ideas nor one which, although ostensibly aimed at the regulation of conduct, may actually 'be made the instrument of arbitrary suppression of free expression of views.'" That is equally true here.

[4] Thus, *Cantwell* v. *Connecticut*, 310 U. S. 296, held that a state statute forbidding solicitation of money for any religious

Willoughby, 345 U. S. 83, that it would not review the failure of the Army to commission a physician inducted under the Doctor's Draft Act, stating (345 U. S. at 93–94):

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism, or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. * * *

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cause without state certification was a previous restraint upon the free exercise of religion in violation of the Fourteenth Amendment. In *American Communications Association* v. *Douds*, 339 U. S. 382, this Court sustained the constitutionality of Section 9 (h) of the National Labor Relations Act, which denied the benefits of certain provisions of that Act to labor unions whose officers failed to file "non-Communist" affidavits. In *Hague* v. *C. I. O.*, 307 U. S. 496, a city ordinance forbidding public assembly in streets or parks without permission from a city official, who might refuse if in his opinion refusal would prevent public disorder, was held invalid on its face. And, finally, in *Wieman* v. *Updegraff*, 344 U. S. 183, this Court held unconstitutional a state statute requiring a loyalty oath as a condition of public employment where no distinction was drawn between innocent and knowing associations.

And in *Reaves* v. *Ainsworth*, 219 U. S. 296, this Court, in holding that it lacked authority to reinstate to duty status an officer discharged by a properly constituted military board, although he claimed his discharge was illegal, declared (219 U. S. at 306):

> * * * The courts have no power to review. The courts are not the only instrumentalities of government. They cannot command or regulate the Army. * * * If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined.

Furthermore, in dealing with the specific question of judicial control over military discharges, the lower courts have been in agreement in denying relief in circumstances similar to those presented here and in ruling that these are matters of military personnel administration. *Gentila* v. *Pace*, 193 F. 2d 924 (C. A. D. C.); *Davis* v. *Woodring*, 111 F. 2d 523 (C. A. D. C.); *Bernstein* v. *Herren*, 141 F. Supp. 78 (S. D. N. Y.), affirmed on other grounds, 234 F. 2d 434 (C. A. 2), certiorari denied, 352 U. S. 840; *Marshall* v. *Wyman*, 132 F. Supp. 169 (N. D. Cal.); *Nordmann* v. *Woodring*, 28 F. Supp. 573 (W. D. Okla.). Thus,

no conflict of decisions is presented for resolution by this Court.[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1957.

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[6] In addition, it is settled law that, as stated in the opinion below, "The courts will not direct by *mandamus* any executive action which lies within the realm of executive discretion" (Pet. 46–47).

APPENDIX

38 U. S. C. 693h provides in pertinent part:

> The Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Navy, after conference with the Administrator of Veterans' Affairs, are authorized and directed to establish in the Army, Air Force, and Navy Departments, respectively, boards of review composed of five members each, whose duties shall be to review, on their own motion or upon the request of a former officer or enlisted man or woman or, if deceased, by the surviving spouse, next of kin, or legal representative, the type and nature of his discharge or dismissal, except a discharge or dismissal by reason of the sentence of a general court martial. Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person. Witnesses shall be permitted to present testimony either in person or by affidavit and the person requesting review shall be allowed to appear before such board in person or by counsel: * * *. Such board shall have authority, except in the case of a discharge or dismissal by reason of the sentence of a general court martial, to change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board. The Articles of War and the Articles for the Government of the Navy are amended to authorize the Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Navy to establish such boards of review, the findings thereof to be final subject only to review by the Secretary of the

Army, the Secretary of the Air Force or the Secretary of the Navy, respectively * * *.

5 U. S. C. 191a provides in pertinent part:

> The Secretaries of the Army, Navy, and Air Force, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and corrections so made shall be final and conclusive on all officers of the Government except when procured by means of fraud * * *.

10 U. S. C. 652a provides:

> No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial.

50 U. S. C. App. 454 (b) provides:

> Each person inducted into the Armed Forces under the provisions of subsection (a) of this section shall serve on active training and service for a period of twenty-four consecutive months, unless sooner released, transferred, or discharged in accordance with procedures prescribed by the Secretary of Defense (or the Secretary of the Treasury with respect to the United States Coast Guard) or as otherwise prescribed by subsection (d) of section 4 of this title [subsection (d) of this section].

5 U. S. C. 171a (c) (4) provides:

> The Departments of the Army, Navy, and Air Force shall be separately administered by their respective Secretaries under the direction, authority, and control of the Secretary of Defense.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 80

JOHN HENRY HARMON III, PETITIONER

v.

WILBER M. BRUCKER, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF THE ARMY

No. 141

HOWARD D. ABRAMOWITZ, PETITIONER

v.

WILBER M. BRUCKER

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

No. 80. The opinion of the United States District Court for the District of Columbia (H. R. 99–104) [1]

[1] Record references in No. 80 (*Harmon*) are designated "H. R. ——", and in No. 141 (*Abramowitz*) are designated "A. R. ——". References to the briefs of petitioners Harmon and Abramowitz will be designated "H. Br. ——" and "A. Br. ——" respectively. The respective petitioners will be referred

is reported at 137 F. Supp. 475. The opinions in the United States Court of Appeals for the District of Columbia Circuit (R. 116–138) are reported at 243 F. 2d 613.

No. 141. The order of the United States District Court for the District of Columbia granting summary judgment (A. R. 22) was entered without opinion. The *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit (A. R. 23) is reported at 243 F. 2d 834.

JURISDICTION

No. 80. The judgment of the Court of Appeals (H. R. 139) was entered on January 31, 1957. The petition for a writ of certiorari was filed on February 15, 1957, and was granted on May 13, 1957 (H. R. 140). 353 U. S. 956.

No. 141. The judgment of the Court of Appeals (A. R. 24) was entered on April 26, 1957. The petition for a writ of certiorari was filed on May 27, 1957, and was granted on June 17, 1957 (A. R. 25). 354 U. S. 920.

In both cases, the jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the District Courts have jurisdiction to review the administrative issuance of military discharges.

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to by name; since the Secretary of the Army is the respondent in both cases, he will be referred to as "respondent" or "the Secretary". In order to avoid confusion with the record references, Army Regulations will be cited as "Army Reg. —" rather than the usual reference, "A. R. ——".

2. Whether the Secretary of the Army has statutory authority to discharge enlisted personnel whose retention in the Army is determined not to be clearly consistent with the interests of national security, and to issue certificates of General Discharge (under honorable conditions) or Undesirable Discharge to personnel so discharged.

3. Whether the action of the Secretary of the Army, taken under the applicable Army security regulations, in issuing a General Discharge (under honorable conditions) to Harmon and an Undesirable Discharge to Abramowitz, causes the petitioners any legally remediable injury.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The constitutional provisions involved are Article I, Section 8, Clause 14; Article 1, Section 9, Clause 3; Article II, Section 2, Clause 1; and the First, Fifth, and Sixth Amendments to the Constitution of the United States. The statutes involved are Section 1 of Chapter II of the Act of June 4, 1920, 41 Stat. 809, as amended, 10 U. S. C. 652a;[2] Section 4 (b)

[2] Now 10 U. S. C. (Supp. IV) 3811. The provisions of former Title 10, together with numerous provisions relating to the Armed Forces previously codified in other titles of the Code, were repealed, revised and reenacted as Title 10 by the Act of August 10, 1956, Sec. 53, published as volume 70A of the Statutes at Large. Although some wording has been altered for purposes of clarity, "[t]he object of the new [title] has been to restate existing law, not to make new law". H. Rep. 970, 84th Cong., 1st sess., p. 8. S. Rep. 2484, 84th Cong., 2d sess., p. 19. The statutes listed above as being directly involved in this case will be referred to throughout this brief by their former citations,

of the Universal Military Training and Service Act, 62 Stat. 606, as amended, 50 U. S. C. App. 454 (b); Sections 248 and 249 of the Armed Forces Reserve Act of 1952, 66 Stat. 495, 50 U. S. C. 991 and 992;[3] Section 301 of the Servicemen's Readjustment Act of June 22, 1944, 58 Stat. 286, as amended, 38 U. S. C. 693h; Section 207 of the Legislative Reorganization Act of August 2, 1946, 60 Stat. 837, as amended, 5 U. S. C. 191a;[4] and Section 5 of the National Security Act Amendments of 1949, 63 Stat. 580, as amended, 5 U. S. C. 171a (c) (4). The regulations involved are Department of Defense Directive 5210.9 and portions of Army Regulation 604–10. With the exception of Defense Directive 5210.9, which is set forth in full at pp. 33–45 of the Record in *Harmon,* and Army Regulation 604–10, which is printed as an Appendix to petitioner Abramowitz's brief (A. Br. 37–50), the foregoing provisions are set forth in Appendix A, *infra,* at pp. 77–81.

STATEMENT

Both of these cases are suits to review the action of the Secretary of the Army in issuing military discharges less than honorable and to compel him to issue Honorable Discharges to petitioners. The only significant differences are two: first, Harmon (No. 80) has been discharged with a General Discharge (under

since the texts set forth are those in effect at the time these actions were commenced. Other statutes referred to, if recodified, will, as a general rule, be cited according to the sections of Title 10 into which they are presently codified.

[3] Now 10 U. S. C. (Supp. IV) 1162 and 1163.

[4] Now 10 U. S. C. (Supp. IV) 1552.

honorable conditions) in lieu of the Undesirable Discharge originally issued him, while Abramowitz, after honorable separation from active duty, was subsequently given an Undesirable Discharge from the Enlisted Reserve; second, the character of Harmon's discharge was predicated in part upon in-service conduct and in part upon pre-induction activity, while the character of Abramowitz's discharge was predicated entirely upon pre-induction activity. The cases are calendared for consecutive presentation to the Court. Due to the similarity of most of the basic issues, we are presenting our arguments in both cases in this single brief. The facts in the two cases are as follows:

1. *No. 80.* Petitioner Harmon was inducted into the Army on October 31, 1952, under the Universal Military Training and Service Act, 50 U. S. C. App. 451, *et seq.* (H. R. 2–3). On May 7, 1953, he was interrogated by military authorities concerning membership in, association with, or activity on behalf of the Communist Party and persons or organizations connected therewith, and his willingness to bear arms against Communist-dominated and influenced nations. Harmon answered some of the questions and as to others invoked his privilege against self-incrimination (H. R. 91–98).

On February 9, 1954, the Adjutant General ordered Harmon to explain in writing certain information relevant to his security status which had been received by the Army. This information concerned reports that Harmon had been employed in 1951 and

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1952 by organizations which were reported to be subversive or Communist-operated; that he had registered in New York in 1952 with the American Labor Party, cited by the House Un-American Activities Committee as being under Communist control in New York City; that he had solicited contributions for the defense of persons under indictment for violations of the Smith Act; that he had associated with Communists or Communist sympathizers; that his father was a member of the Communist Party and a member of or active in other organizations cited as subversive or Communist by the Attorney General, and had registered with the American Labor Party; and that his stepmother had registered with the American Labor Party (H. R. 3–4).

On March 11, 1954, Harmon replied with respect to this information. He acknowledged that he worked in 1951 and 1952 at Camp Lakeland, which was reported to be a Communist-operated camp, but asserted it was labelled as Communist-dominated by persons opposed to inter-racial relations. He also acknowledged employment in 1949 by the Detroit Urban League, reportedly a subversive organization, but asserted that he took the job because he needed summer employment and that he did not know the League as a subversive organization. Harmon did not explicitly acknowledge that in 1952 he registered to vote with the American Labor Party in New York, but asserted that it was a lawful political organization and that he had the right to vote for the party of his choice. He stated that he had solicited funds

for the defense of persons under indictment for violation of the Smith Act, but asserted he had a constitutional right to do so.[5] He refused to reply to the allegations concerning his father and stepmother on the ground that such questions were irrelevant since his father and stepmother were not employed by the Federal Government. Harmon also asserted that he had never been a member of the Communist Party, but that it was possible that, as a public speaker, he had been acquainted with Communists or Communist sympathizers (H. R. 4–6).

On April 2, 1954, Harmon was informed that the Army would not discharge him as "disloyal or subversive," but that he would be assigned to nonsensitive duties in the lowest pay grade, and that, upon completion of his term of service, he would be given a type of discharge appropriate to the character of the service he had rendered (H. R. 6–7). This determination was based upon the provisions of Army Regulation 615–370 providing for the retention in the Army of persons found to be security risks but not disloyal or subversive (H. R. 29).

On April 7, 1954, the Secretary of Defense issued Department of Defense Directive 5210.9 (H. R. 33–45). The purpose of the directive was to effect the modification of outstanding regulations of the armed services so as to apply to military personnel the criteria of the security program established for the Government's civilian employees by Executive Order

[5] The record shows that these solicitations took place several weeks after Harmon was inducted into the Army (H. R. 7–8).

10450 (April 27, 1953, 18 F. R. 2489) (H. R. 34). The directive prescribed that "[t]he standard for * * * retention within the Armed Services shall be that on all the available information it is determined that * * * retention is clearly consistent with the interests of national security" (H. R. 36). The directive was accompanied by a Memorandum from the Secretary of Defense directing that cases previously cleared be reviewed under the new standard (H. R. 32–33).

The Army thereupon reviewed Harmon's case and determined that his retention in the service was inconsistent with the interests of national security and that he should be discharged with an Undesirable Discharge (H. R. 30–31). On June 2, 1954, he was so discharged (H. R. 13, 14). His discharge certificate contained no notation of the authority under which he was discharged (H. R. 13); the standard-form Report of Separation from the Armed Forces erroneously cited Army Regulation 615–370 instead of Directive 5210.9 as the authority for his discharge (H. R. 14, 98–99).

At the time of his separation, Harmon's service record was marked "excellent" as to character and efficiency for the periods of November 14, 1952, to July 28, 1953, and August 2, 1953 to April 24, 1954; it was marked "unknown" for the balance of his military service (H. R. 9, 114–115).

Immediately after his discharge, Harmon applied to the Army Discharge Review Board to have the character of his discharge changed from Undesirable to Honorable (H. R. 10). On October 22, 1954, he

appeared with counsel at a formal hearing before the Board at which he had the right to present evidence in his behalf, testify in person, or submit a written statement or brief (H. R. 63). Harmon testified as the sole witness, giving in an expanded form essentially the same answers he had given The Adjutant General in writing before his discharge, and explaining his reasons for refusing to answer certain questions during his interrogation on May 7, 1953 (H. R. 63–90). The Army Discharge Review Board ruled against changing the character of Harmon's discharge (H. R. 10). He then applied to the Army Board for the Correction of Military Records for the same relief, but that Board also denied his application (*ibid.*).

Harmon then made a direct request to the Secretary of the Army for the award of an Honorable Discharge (*ibid.*). The request was reviewed by an Assistant Secretary of the Army as the delegate of the respondent. On July 5, 1955, he referred it to the Army Board for the Correction of Military Records (H. R. 45). By letter of July 7, 1955, Harmon's counsel stated that he had no additional evidence to present (H. R. 52–53). The Assistant Secretary of the Army replied that the Board for the Correction of Military Records would consider all material evidence of record and inquired of counsel whether he intended to appear at the hearing scheduled for July 27, 1955 (H. R. 54). Counsel for Harmon wrote that he would not appear at the hearing because he had no additional material to offer (H. R. 55–56). The Army Board for the Correction for Military Records then considered Har-

mon's request on the whole record before it, and recommended to the Assistant Secretary that his discharge certificate not be changed. On November 10, 1955, after reviewing the matter under the standard of Department of Defense Directive 5210.9, the Assistant Secretary approved the Board's recommendation (H. R. 45–46, 56–57).

Subsequent to Harmon's direct request to the Secretary of the Army, but prior to its final determination, the instant action was commenced in the District Court (H. R. 2). After filing of the complaint and answer, the present Secretary of the Army was substituted for his predecessor in office (H. R. 27, 106). Both sides filed motions for summary judgment with supporting affidavits (H. R. 17–26, 28–51). The District Court held that it had no jurisdiction to review, control or compel the granting of military discharge certificates (H. R. 99–104) and it therefore denied Harmon's motion for summary judgment, granted respondent's motion, and dismissed the complaint (H. R. 105).

Harmon appealed from this judgment and, while his appeal was pending, he was notified by The Adjutant General on June 6, 1956, that the character of his discharge was changed from "Undesirable" to "General (Under Honorable Conditions)" (H. R. 110). This change was effected as the result of a review conducted by the Army Discharge Review Board of all military personnel security cases which were closed between November 10, 1948, and November 16, 1955. As a result of this review, Harmon's separation records have been changed to show a dis-

charge under honorable conditions, and a new discharge certificate and report of separation, retroactively reflecting a discharge under honorable conditions, have been issued (H. R. 111–112).

The Court of Appeals, by order of August 17, 1956, denied the respondent's suggestion that this change in the character of Harmon's discharge rendered the case moot (H. R. 115). Subsequently, the court, in an opinion by Judge Prettyman, affirmed the judgment of the District Court, holding that the action of the respondent did not infringe any of Harmon's statutory or constitutional rights, and that, in the absence of such infringement, the court did not have authority to review the exercise by the Secretary of the Army of his discretion to determine what type of discharge a soldier should be given (H. R. 116–129). Judge Bazelon dissented (H. R. 129–138).

2. *No. 141.* Petitioner Abramowitz was inducted into the Army on October 15, 1951, under the Universal Military Training and Service Act (A. R. 2, 10). On June 30, 1953, he was released from active duty with a certificate of honorable separation, and transferred to inactive service in the Enlisted Reserve (A. R. 2–3). Abramowitz thereafter applied for and was granted certain veterans' benefits administered by the Veterans Administration (Appendix B, *infra*, pp. 82–88).*

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*The letter from the General Counsel of the Veterans Administration, cited in the text and printed in the Appendix, was attached to the Defendant's Motion for Summary Judgment (A. R. 16) as Exhibit 1 and was a part of the original record both in the court below and in this Court. It was,

On July 15, 1955, The Adjutant General of the Army informed Abramowitz by letter that the Army had received the following information which furnished reason to believe that his retention in the Army Establishment might not be clearly consistent with the interests of national security: that he had been a member of the Communist Party during 1948 and 1949; that he had been a member of the American Youth for Democracy from 1946 to 1948 and of the Labor Youth League from 1949 to 1951, both organizations cited by the Attorney General as subversive, Communist, or Communist-front; and that during 1950 he had been a subscriber to the "Worker", the Sunday edition of the Communist "Daily Worker". The letter advised Abramowitz that he could elect one or more of the following courses: within 5 days of receipt, request a hearing with counsel and opportunity to present witnesses before a Field Board; within 15 days, rebut the letter in writing with documentary support; or, within 5 days, elect to be discharged from the Enlisted Reserve. It was further stated that failure to request the Field Board hearing might result in action to effect his discharge under the then-current security regulation, S. R. 600–220–1, a copy of which, together with a Summary of Information concerning the allegations, was enclosed with the letter.[1]

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however, inadvertently omitted from the Joint Appendix as printed for the Court of Appeals and also in the designations of the record for printing in this Court.

[1] As Abramowitz notes, S. R. 600–220–1 was superseded by AR 604–10 (A. Br. 37–50) on July 29, 1955, but for present purposes the two regulations are identical (A. Br. 5). The regula-

On August 22, 1955, more than 5 weeks later, Abramowitz replied to this letter. He declined the proffered hearing, electing instead to confine himself to a written response. He did not deny any of the allegations set forth in The Adjutant General's letter, but protested that the allegations did not constitute lawful grounds for his discharge and had no bearing upon his right to retain his status as a member of the Enlisted Reserve (A. R. 8–10).

The Army Security Review Board, a board of officers within the Department of the Army, considered Abramowitz's case under the provisions of Army Reg. 604–10, the security regulation then in force, and recommended that he be discharged with an Undesirable Discharge (A. R. 17). The Secretary of the Army approved this recommendation (A. R. 17), and on September 13, 1955, Abramowitz was discharged from the Enlisted Reserve (A. R. 10). The Undesirable Discharge certificate furnished him noted that "AR 604–10 applies" (A. R. 10).

Abramowitz thereafter applied to the Army Discharge Review Board requesting a change in the type of his discharge (A. R. 3). This request was denied on May 9, 1956 (A. R. 11), and on May 21, 1956 Abramowitz filed his complaint in the District Court (A. R. 2–11). Two days later he filed an application

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tion provided that the character of discharges issued to persons discharged on security grounds should "be predicated upon the gravity of the reasonably substantiated information in derogation" (A. Br. App. 44, § 19 (a)), but that it should be "no higher than 'General, under Honorable Conditions'" (A. Br. App. 38–39, § 3 (b)).

for review with the Army Board for Correction of Military Records, which was denied on September 7, 1956 (A. R. 19–21).

Meanwhile, Abramowitz had moved for summary judgment in the present action (A. R. 12–14) and the respondent had answered (A. R. 15–16) and filed a cross-motion for summary judgment (A. R. 16–20). As in Harmon's case, the District Court held that it had no authority to review, control or compel the granting of particular types of military discharge certificates, and accordingly denied Abramowitz's motion for summary judgment, granted respondent's motion, and dismissed the complaint (A. R. 22). On appeal, the Court of Appeals ruled that its decision in *Harmon* was controlling and affirmed in a *per curiam* opinion (A. R. 23).

SUMMARY OF ARGUMENT

I

A. Congress throughout our history has left the form and character of administratively-issued military discharges to the discretion of the Executive Branch of the Government. It has never given evidence that the exercise of this discretion is amenable to judicial scrutiny and control. Acting under its broad constitutional authority "To make Rules for the Government and Regulation of the land and naval Forces" (Art. 1, Section 8, Cl. 14), Congress has required the Army to issue certificates of discharge and has provided that "No enlisted person * * * shall be [administratively] discharged * * * except in the manner prescribed by the Secretary of the Depart-

ment of the Army * * *". No statutory limitations have been imposed upon the discretion of the Secretary to promulgate regulations establishing categories of discharges for administrative issuance and to apply those regulations to individual cases, other than to require, in certain cases, findings by a board of officers before a member of the Enlisted Reserve may be involuntarily discharged for cause under less than honorable conditions—a statutory requirement complied with here. This general absence of congressional limitations, either substantive or procedural, upon executive discretion is coupled with congressional recognition of the regulations of the Army prescribing various types of administrative, non-punitive discharges, some issued under honorable conditions and others under other than honorable conditions. Congress has also recognized that the Army issues Undesirable Discharges in some cases of dismissal on security grounds.

Never has Congress overruled these regulations and practices by substituting a detailed statutory scheme of discharges for the long-standing regulatory scheme. Nor has it provided for judicial review. Instead, Congress has reserved to itself the function of correcting abuses or mistakes in the exercise of the administrative discretion. For at least seventy years, Congress granted such relief by passing numerous private bills altering the character of military discharges, a practice demonstrating that Congress never intended the courts to have identical authority to review and grant relief in such cases. When Congress gave up this time-consuming function in the Legis-

lative Reorganization Act of 1946, it transferred its powers not to the courts but to administrative boards, subject to the approval of the Secretary. Congress prohibited the introduction of private bills to correct military records and authorized the establishment of the Army Board for the Correction of Military Records. At the same time, Congress prohibited the introduction of private bills for the relief of persons injured by the negligence of Government employees, but provided *both* an administrative and a judicial remedy in such cases (Legislative Reorganization Act of 1946, 60 Stat. 812, *et seq.*). Congress clearly did not authorize by mere implication a similar judicial remedy for the correction of military records, including discharges, particularly when to have done so would have imposed a staggering burden upon the courts of the District of Columbia.

B. The judicial decisions in this area bear out our contention that the actions here in question are not subject to judicial review. This Court and the lower courts have consistently recognized that "judges are not given the task of running the Army." *Orloff* v. *Willoughby*, 345 U. S. 83, 93. Considerations involving the separation of powers and the requirements of military morale and discipline have caused the Court to stay its hand where the military has acted in matters committed to its authority, and to refuse to apply to the military the standards which govern judicial review of administrative action in civilian fields. Since the Army had jurisdiction of the petitioners, jurisdiction to determine whether their retention in the Army was clearly consistent with the in-

terests of national security, and jurisdiction to issue them administrative discharges, there is no basis for review of the actions of the respondent in these cases.

II

In any event, the discharges issued to petitioners do not invade any legally protected rights of petitioners and therefore furnish no basis for claims upon which relief may be granted. Petitioners' speculative contentions as to possible future adversities, arising from the potential loss of state veterans' benefits and from apprehension of lowered community esteem, are not injuries of the kind which give rise to federal jurisdiction. Both petitioners are fully eligible for federal veterans' benefits, and there is no showing that state benefits, which are gratuities at best, will not be similarly awarded them. Nor is the speculative stigma of a General Discharge (under honorable conditions) or an Undesirable Discharge a legally remediable injury, since no legal disabilities have attached as a result of these discharges.

The notation "AR 604–10 applies" on Abramowitz's discharge, indicative of a determination that his retention in the Army was not clearly consistent with the interests of national security, similarly gives rise to no legal injury. Petitioners do not contest the Army's right to make this determination. Their claims to unlawful and actionable government defamation therefore rest upon admittedly valid determinations made by government officials concededly acting within the scope of their authority. Such official action cannot, however, serve as the basis for a cause of action in

defamation. *Spalding* v. *Vilas*, 161 U. S. 483. Moreover, the determination here made is not inherently defamatory, even if it were to be assumed that a determination that petitioners were "Communists" or "subversives" would be.

Petitioners have suffered no "punishment" in the legal or constitutional sense. Both Congress and the courts have recognized that administrative discharges are not "punishment." Such First Amendment rights as petitioners may have had to engage in the pre-induction activities here involved have therefore not been infringed, nor is the Army guilty of violating the prohibitions against bills of attainder and *ex post facto* laws. Since administrative discharge proceedings are not criminal trials, the Sixth Amendment has no application.

ARGUMENT

INTRODUCTION

Petitioners ask this Court to nullify the less-than-honorable discharges issued to them by the Army and to compel the issuance of Honorable Discharges. They assert that the pertinent Department of Defense directive and Army Regulation, as applied to them, violate their rights to procedural and substantive due process and trial by jury guaranteed by the Fifth and Sixth Amendments, their rights to free speech and assembly guaranteed by the First Amendment, and the proscriptions against bills of attainder and *ex post facto* laws contained in Article I, Section 9 of the Constitution.

In view of this broad range of constitutional issues sought to be raised, it is necessary at the outset to

give some more precise definition to the issues actually presented for adjudication, not only as we see them but as they have been circumscribed by petitioners themselves.

1. In our view, these cases present two dispositive jurisdictional issues: whether military discharges are subject to judicial review at all; and if they are, whether the issuance of military discharges, designated in one case "General Discharge (Under Honorable Conditions)", with no notations, and in the other case "Undesirable Discharge", with the notation "AR 604–10 applies", gives rise in these cases to legal injuries cognizable in the courts. We answer both questions in the negative, in Points I and II, *infra*, and submit that these answers are fully dispositive of these cases. It is our initial contention that Congress, which, with the President, has plenary authority over the Armed Forces, has never given the courts jurisdiction to review or control the administrative issuance of military discharges, but has, instead, vested broad discretion in the heads of the service departments to establish categories and conditions of discharges, and has reserved to itself, or its delegates, the function of correcting any abuses or mistakes. Our second contention is that, questions of *in limine* jurisdiction aside, these particular cases present no justiciable controversies because the discharges here have given rise to no legal injuries.

2. Petitioners appear to agree that the critical jurisdictional issues are as we have stated. They would answer both jurisdictional questions in the affirmative, by attempting to derive a constitutional and statutory basis for judicial review of any less-than-

honorable discharge and of any notation which might reveal that security considerations were the cause for discharge. Their fundamental argument is that there is a constitutionally protected "right" to an Honorable Discharge requiring procedural and substantive due process in issuing any other types of discharge; an ancillary claim is that the dischargee's activities in constitutionally protected areas may not lawfully provide grounds for the issuance of a less-than-honorable discharge, at least in the absence of their overt adverse effects upon military service.

Petitioners would not limit judicial review to the enforcement of proper procedures in discharging; they would require review of the basis for the discharge. Here, they ask the Court to nullify their discharges because—procedural questions aside—they are grounded (at least in part) upon the consideration of preinduction activities. Indeed, petitioner Harmon contends that, if a less-than-honorable discharge carries with it a notation indicating that it is given because the dischargee's retention is deemed not clearly consistent with the interests of national security, its issuance is not merely subject to judicial review but may not be accomplished "without providing * * * all the safeguards of a judicial trial, or in the alternative, the safeguards of a General Court-Martial under the Uniform Code of Military Justice" (H. Br. 41).

3. What petitioners do *not* contend is equally important. They do *not* urge that any of the following actions, in and of themselves, invade their legally-protected rights:—the underlying determinations that

their continued retention in the Army was not clearly consistent with the interests of national security; the procedures adopted or the information relied upon in reaching those determinations; or their resulting dismissals. They concede that the "Army has an absolute right to discharge any member of the Armed Forces for any reason which, in its unrestricted judgment, seems to be necessary for its best interests".[1] Petitioners' concern with constitutional issues, "loyalty", "security", and analogous questions, is thus limited to the extent to which these matters may be reflected in a military discharge certificate and accompanying documents.

This delineation of the issues by petitioners has special significance in placing the present cases in their proper perspective in the series of cases which have come before this Court involving the loyalty and security programs of the Executive Branch of the Government. The past cases have arisen under Executive Order 9835 (12 F. R. 1935), the original order establishing a loyalty program for federal employees, and Executive Order 10450 (18 F. R. 2489), revoking and superseding Executive Order 9835 and establishing an employee program based on considerations of security rather than loyalty. While Defense Directive 5210.9 and Army Reg. 604–10, under which petitioners were discharged, contain essentially the same provisions as Executive Order 10450, modified to meet the needs of the military, the issues here are quite different from those previously raised.

[1] (A. Br. 25; see also H. Br. 15, 16, 25, 31, 40, 46, 47, especially p. 31.)

Unlike the contentions made in those earlier cases, petitioners' claims do not relate to civilian government *employment* but to military *discharge* certificates; they are not based upon loyalty determinations but upon notations indicative of determinations that petitioners' retention in the Army was not clearly consistent with the interests of national security—determinations which petitioners concede the Army was authorized to make with no procedures whatsoever, so long as an Honorable Discharge followed. Petitioners, in short, are concerned not at all with their retention in the military service, but solely with the character of the discharges granted them.

I

THE FORM AND CHARACTER OF DISCHARGES FROM THE MILITARY SERVICE IS A MATTER OF EXECUTIVE DISCRETION AND IS NOT SUBJECT TO JUDICIAL REVIEW

A. CONGRESS HAS TRADITIONALLY LEFT THE ESTABLISHMENT OF TYPES AND CONDITIONS OF MILITARY DISCHARGES TO THE EXECUTIVE BRANCH, AND THE ARMY HAS TRADITIONALLY PROVIDED DIFFERENT TYPES OF DISCHARGES

The Constitution divides authority over the military establishment between the President, who is designated "Commander in Chief of the Army and Navy",[9] and the Congress, which is given specific authority "To raise and support Armies"[10] and "To make Rules for the Government and Regulation of the land and naval Forces".[11] See, generally, Rossiter, *The*

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[9] Art. II, Sec. 2, Cl. 1.
[10] Art. I, Sec. 8, Cl. 12.
[11] Art. I, Sec. 8, Cl. 14.

Supreme Court and the Commander in Chief (1951). In the exercise of this latter power, Congress has established the Department of the Army and, as the court below noted, has "clearly express[ed] a Congressional intent that the Army be administered solely by the executive branch of the Government".[12]

In providing for the separation of soldiers from the Army, Congress has made express provision for discharges ever since the founding of the Republic. It has never, however, exercised this power to the extent of specifying particular types or conditions of discharges. These matters have been left to the discretion of the Army itself. Cf. *Patterson* v. *Lamb*, 329 U. S. 539, 542; *United States* v. *Kingsley*, 138 U. S. 87; *Gentila* v. *Pace*, 193 F. 2d 924 (C. A. D. C.), certiorari denied, 342 U. S. 943; *Davis* v. *Woodring*, 111 F. 2d 523 (C. A. D. C.); *Palmer* v. *United States*, 72 C. Cls. 401; *Reid* v. *United States*, 161 Fed. 469 (S. D. N. Y.), writ of error dismissed, 211 U. S. 529.

1. *The statutes.* The basic statute relating to the discharge of enlisted personnel vests plenary discretion over discharges in the Secretary of the Army. At the time the present actions were commenced, it read as follows (Act of June 4, 1920, Chap. II, Art. 108, 41 Stat. 759, 809, as amended, formerly 10 U. S. C. 652a; emphasis added):[13]

> No enlisted person, lawfully inducted into the military service of the United States, shall

[12] H. R. 120, citing 10 U. S. C. (Supp. IV) 3012.

[13] This provision was rephrased in the recodification of Title 10 (Sec. 3811).

> be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, *except in the manner prescribed by the Secretary of the Department of the Army,* or by sentence of a general or special court-martial.

This statute finds its origin in the British Articles of War in force at the outbreak of the American Revolution.[14] The substance of the provision has remained unchanged since the enactment of the Articles of War of 1806 (Act of April 10, 1806, Art. 11, 2 Stat. 359).[15]

Other existing statutes refer to the discharge of particular categories of soldiers, but again they do not attempt to control the discretion of the Secretary of the Army or the Secretary of Defense. The Universal Military Training and Service Act provides (Sec. 4 (b), 50 U. S. C. App. 454 (b); emphasis added):

> Each person inducted into the Armed Forces under the provisions of subsection (a) of this section shall serve on active training and service for a period of twenty-four consecutive months, unless sooner released, transferred, or

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[14] Sec. III, Art. II; reprinted in Winthrop, *Military Law and Precedents* 931, 933 (1920 ed.). See also American Articles of War of 1775 passed by the Continental Congress on June 30, 1775, Art. I, 1 Journals of the American Congress, pp. 90, 94–96, reprinted in Winthrop, pp. 953, 956–958; American Articles of War of 1776, Sec. III, Art. 2, 1 Journals of the American Congress, pp. 482, 483, reprinted in Winthrop, pp. 961, 962; American Articles, enacted May 31, 1786, Art. 13, 4 Journals of the American Congress, pp. 649, 650, reprinted in Winthrop, pp. 972, 973.

[15] See Title XIV, Rev. Stat. (2d ed., 1878), Sec. 1342, Art. 4, p. 230.

discharged *in accordance with procedures prescribed by the Secretary of Defense* (or the Secretary of the Treasury with respect to the United States Coast Guard) or as otherwise prescribed by subsection (d) of section 4 of this title [subsection (d) of this section].

The Armed Forces Reserve Act of 1952 provided [16] (50 U. S. C. 991, 992; emphasis added):

SEC. 248. Subject to the provisions of this Act, the discharge of commissioned officers of the reserve components shall be effected at the pleasure of the President, and the discharge of other members of the reserve components shall be *in accordance with regulations promulgated by the appropriate Secretary.*

SEC. 249. (a) * * *

(b) The President or the appropriate Secretary may drop from the rolls any member of the reserve components who has been absent without authority from his place of duty for a period of three months or more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a Federal or State penitentiary or correctional institution.

(c) A member of a reserve component discharged or separated for cause other than as specified in subsection (b) of this section shall be given a discharge under honorable conditions unless—

(1) a discharge under conditions other than honorable is effected pursuant to the approved sentence of a court-martial or the approved

[16] These provisions, in modified form, are now codified in 10 U. S. C. (Supp. IV) 1162, 1163.

findings of a board of officers convened by competent authority, or

(2) the member consents to a discharge under conditions other than honorable with waiver of court-martial or board proceedings.

See also 10 U. S. C. (Supp. IV) 3812, 3813 and 3816.

Although the statutes do not prescribe the various types or conditions of discharges, Congress has frequently recognized, with implicit approval, the fact that different types of discharges are given—some punitive, pursuant to courts-martial sentences, and others by administrative issuance.[17] Congress has expressly recognized the two types of discharge—Bad-Conduct and Dishonorable—reserved exclusively for punishment, and has exercised limited control over their issuance by defining the powers of courts-martial to prescribe such discharges.[18] There has been no such explicit statutory reference to the names of the various types of discharges authorized for administrative issuance by Army Regulations.[19] Nevertheless, Congress has recognized the general category of "administrative discharge"[20] and also the practice

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[17] See Davis, *A Treatise on the Military Law of the United States*, 357 (3d ed., 1913).

[18] Uniform Code of Military Justice (64 Stat. 108, *et seq.*, 10 U. S. C. (Supp. IV) 801, *et seq.*), Arts. 18–20, 10 U. S. C. (Supp. IV) 818–820. See also Arts. 65, 66, 71–76, 10 U. S. C. (Supp. IV) 865, 866, 871–876; and 10 U. S. C. (Supp. IV) 3636.

[19] A statute relating to the settlement of a soldier's indebtedness to the United States upon discharge does, however, refer to "an enlisted member's * * * honorable discharge" (10 U. S. C. (Supp. IV) 4837 (d)).

[20] The Article of the Uniform Code dealing with the remission or suspension of court-martial sentences provides that "[t]he Secretary concerned may, for good cause, substitute *an*

of issuing differing types of administrative discharges under differing conditions, which may be either honorable or other than honorable.[21] This congressional awareness is evident in the statutory authority given the Army Discharge Review Board "to review * * * the *type and nature* of [a] discharge or dismissal, *except* a discharge or dismissal by reason of the sen-

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administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial" (Art. 74 (b), 10 U. S. C. (Supp. IV) 874 (b); emphasis added). Article 75 (10 U. S. C. (Supp. IV) 875) states that if a court-martial sentence is set aside or disapproved on review, all rights affected by an executed part of the sentence, "except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered * * *"; if a new trial is ordered and "a previously executed sentence of dishonorable or bad-conduct discharge is not imposed * * *, the Secretary concerned shall substitute therefor *a form of discharge authorized for administrative issuance* unless the accused is to serve out the remainder of his enlistment" (emphasis added). Section 12 of the Act of May 5, 1950, 64 Stat. 147, 50 U. S. C. 740, authorizes the Judge Advocate General, in certain circumstances, to make a similar substitution of "a form of discharge authorized for administrative issuance" for "a dismissal, dishonorable discharge, or bad-conduct discharge, previously executed * * *".

[21] A partial list of phrases used by Congress in referring to the character of a soldier's separation from the military is as follows: "served honorably": 38 U. S. C. 706b, 8 U. S. C. 1440 (a); "service terminated honorably": 24 U. S. C. 279a and 281; "honorably discharged": 53 Stat. 999, 28 U. S. C. 755, 43 U. S. C. 238, 279 and 331; "discharged [or separated] under honorable conditions": 5 U. S. C. 645d and 851; 8 U. S. C. 1440, 37 U. S. C. 32, 38 U. S. C. 691a and 1011 (a); "discharged honorably or under honorable conditions": 10 U. S. C. (Supp. IV) 772 (d); "discharged under conditions other than dishonorable": 7 U. S. C. 1001 (b) (2), 38 U. S. C. 694 (a), 695f, 696 (a), 911 (2) (B), and 997, 42 U. S. C. 417 (d) (2) and 1477, 70 Stat. 869, Sec. 303 (e); "dishonorably discharged": 8 U. S. C. 1481 (a) (8), 38 U. S. C. 706.

tence of a general court-martial * * * [and] to change, correct, or modify any [such] discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board" (58 Stat. 286, as amended, 38 U. S. C. 693h, emphasis added).

Congressional recognition of the differing types of administrative discharge is further evident in the Armed Forces Reserve Act of 1952, the one statute establishing statutory procedural (but not substantive) requirements for the issuance of administrative discharges. Section 249 (c) of that Act, quoted *supra*, at pp. 25–26, provides in substance that an administrative discharge from the reserves for cause, under other than honorable conditions, can be issued to a reservist only after board proceedings (such as were held in Abramowitz's case (A. R. 17)) or the waiver of such proceedings.

The legislative history of this provision of the Armed Forces Reserve Act of 1952 shows specifically that Congress recognized and acquiesced in the administrative issuance of less-than-honorable discharges in security cases. The provisions of what was enacted as Section 249 were originally found in Section 250 of H. R. 4667 and its successors, H. R. 4860 and H. R. 5426. The provisions of subsection (c) in these bills were essentially the same as those finally enacted (*supra*, pp. 25–26), including subparts (1) and (2), except that they contained a third subpart:

> (c) A member of a reserve component discharged for cause other than as specified in subsection (b) of this section shall be given a

discharge under honorable conditions unless—

(1) * * *

(2) * * *

(3) *The appropriate Secretary determines that a hearing is not in the best interests of the Government for security reasons.* [Emphasis added.]

The House Committee report explained this provision as follows (H. Rep. No. 1066, 82nd Cong., 1st sess. (1951), p. 49; emphasis added):

SECTION 250. *Limitations on discharges*

(a) * * *

(b) * * *

(c) *Character of discharge.*—This subsection requires a member of the reserve components discharged for cause to be given a discharge under honorable conditions unless dropped from the rolls under subsection (*b*), discharged pursuant to sentence of court martial or pursuant to findings of a board of officers, *discharged for security reasons,* or discharged after waiver of court-martial or board proceedings.

In other words, the bill would have authorized the administrative issuance to reservists, on security grounds, of discharges under other than honorable conditions (*i. e.,* Undesirable Discharges) without a hearing. On the day the measure was reported to the House, this third subpart was deleted, thereby subjecting security cases to the requirement of board proceedings before the issuance of an Undesirable Discharge (97 Cong. Rec. 13152, 13162).

This legislative history shows more than mere congressional approval of the issuance of undesirable dis-

charges in security cases; it demonstrates that Congress has been aware of the problems involved in discharging security risks and that it could have resolved all of the problems itself by appropriate legislation if it so desired. The numerous congressional materials cited by petitioners further demonstrate this fact (H. Br. 24, 35, 38, 45; A. Br. 18, 26, 31, 35). But the only "[p]rotections against arbitrary discharge" which Congress chose to enact in this field are those found in Sections 248 and 249 of the Armed Services Reserve Act of 1952 (see H. Rep. No. 1066, 82nd Cong., 1st sess. (1951), p. 39). These protections apply to Abramowitz, who was discharged from the reserve, and have been complied with (A. R. 17).

2. *The regulations.* The regulations implementing the statutes are issued under the broad authority of the Secretary of the Army, acting on behalf of the President as Commander-in-Chief.[22] They prescribe three types of discharge for administrative issuance: Honorable, General, and Undesirable.[23] The Unde-

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[22] Congress conferred express authority for the issuance of regulations for the government of the Army by the Act of March 1, 1875, 18 Stat. 337, 10 U. S. C. (Supp. IV) 3061, though doubtless the President always had such power by virtue of being the Commander-in-Chief. *United States* v. *Eliason*, 16 Pet. 291, 301; *United States* v. *Freeman*, 3 How. 556, 567; *Gratiot* v. *United States*, 4 How. 80, 117–118; *Kurtz* v. *Moffitt*, 115 U. S. 487, 503; see Lieber, *Remarks on the Army Regulations* (1898), 48–49, 72–73, 151–184. See also 10 U. S. C. (Supp. IV) 121; Act of July 26, 1947, Sec. 202, 61 Stat. 500, as amended, 5 U. S. C. 171a (b); Act of August 7, 1789, 1 Stat. 49, as amended, 10 U. S. C. 3012.

[23] A form of Honorable Discharge certificate has been issued for "honest and faithful service" at least since 1821. General Regulations for the Army, 1821, Para. 9, Art. 71, and Para. 12,

sirable Discharge and General Discharge were first provided for by name in 1947.[24] The 1953 Regulations, in effect at the time of petitioners' discharges,

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Art. 79. The Undesirable Discharge had its origin in the "discharge without honor" (see *Reid* v. *United States*, 161 Fed. 469 (S. D. N. Y.), writ of error dismissed, 211 U. S. 529), a type of discharge not officially provided for in the regulations until 1893 (Circular 15, Headquarters of the Army, 1893) but which had in fact been issued since the Civil War in circumstances where the discharge was neither honorable nor dishonorable. Howland, *Digest of Opinions of The Judge Advocates General of the Army*, (1912) 435, para. III A; see Davis, *A Treatise on the Military Law of the United States*, 357 (3d ed., 1913). The discharge without honor was replaced in the 1913 regulations by what was termed merely a "discharge," for use where the separation was based upon the soldier's ineptness, lack of adaptability or habits or traits of character rendering his "retention in the service * * * undesirable", or misconduct rendering him "disqualified for service, physically or in character". Regulations for the Army, Art. XXI, paras. 148½ and 150, dated November 15, 1913. See *Patterson* v. *Lamb*, 329 U. S. 539, 542, fn. 5. The prototype of the present-day General Discharge (under honorable conditions) was created in 1921 when provision was made for the issuance of an honorable discharge certificate, with the notation "reenlistment not warranted", when the soldier's conduct had been such as to render his retention desirable were it not for his inaptitude or lack of adaptability (*ibid.*, Change No. 117, July 1, 1921), *i. e.*, when he was unfit for retention through no fault of his own. Cf. *Bolger* v. *Marshall*, 193 F. 2d 37 (C. A. D. C.). At the same time, Paragraph 150 was amended to provide that the blank form for "honorable discharge" should not be used in cases where "the discharge is due to the commission of some crime or to some misconduct prior to entry into the service * * *", despite the fact that the conduct of the enlisted man had otherwise been such as to warrant reenlistment (*ibid.*). The only discharge authorized in such cases was "the discharge". Army Regulation 615–360 of December 6, 1922, substituted the "blue discharge" as the intermediate type for issuance in cases where the discharge was neither honorable nor dishonorable. See *In re Fong Chew Chung*, 149 F. 2d 904, 905–906, fn. 1 (C. A. 9).

[24] Circular No. 122, dated May 14, 1947.

prescribed five types of discharge certificates under the following scheme: [25]

Type of discharge	Character of discharge	Given by
Honorable	Honorable	Administrative action.
General	Under honorable conditions.	Administrative action.
Undesirable	Under conditions other than honorable.	Administrative action.
Bad conduct	Under conditions other than honorable.	Sentence of special or general court-martial.
Dishonorable	Dishonorable	Sentence of general court-martial.

Except as otherwise provided in the regulations, the Honorable Discharge certificate is prescribed for issuance in cases where the soldier's conduct ratings are at least "Very Good," his efficiency ratings at least "Excellent," and he has not been convicted by a general court-martial or more than once by a special court-martial.[26] The General Discharge is given to soldiers discharged under honorable conditions but who do not qualify for an Honorable Discharge.[27] It is prescribed for a soldier discharged for inaptitude or unsuitability for military service, whether through his own fault[28] or otherwise.[29] The regulations state that "[t]he effects of an honorable discharge and a general discharge are identical and entitle an individual so discharged to full rights and benefits." [30]

[25] Army Reg. 615–360, Sec. II, Para. 4, dated June 24, 1953.

[26] Army Reg. 615–360, Sec. III, Para. 8, dated June 24, 1953, as amended.

[27] *Ibid.*

[28] Army Reg. 615–368, Para. 5, dated October 27, 1948, as amended, since superseded by Army Reg. 635–208, dated May 21, 1956.

[29] Army Reg. 635–209, Paras. 2, 8, dated March 17, 1955.

[30] Army Reg. 615–360, Sec. III, Para. 7, dated June 24, 1953.

The Undesirable Discharge (under other than honorable conditions) is given in cases of such misconduct as fraudulent entry into the Army by concealment of citizenship status, of prior conviction, of prior desertion, or of prior discharge under other than honorable conditions; in cases where the soldier is charged with desertion or absence-without-leave and is physically unfit for service; and in cases of conviction by a civil court during term of service.[31] It is also given for undesirable habits and traits of charafter as manifested by chronic alcoholism, drug addiction, homosexuality, repeated venereal infections, repeated petty offenses, habitual shirking and psychopathic personality.[32]

At the time these actions were instituted, the regulations authorized the issuance of either the General or Undesirable discharge in cases processed under the military personnel security program where retention was found to be not clearly consistent with the interests of national security. The type of discharge certificate issued was to be "predicated upon the gravity of the reasonably substantiated information in derogation".[33]

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[31] Army Reg. 615–366, Para. 14, dated February 5, 1954, as amended, since superseded by Army Reg. 635–206, dated January 16, 1956.

[32] Army Reg. 615–368, Para. 5, dated October 27, 1948, as amended, since superseded by Army Reg. 635–208, dated May 21, 1956.

[33] Defense Directive 5210.9, Sec. VIII, Para. F (5) (H. R. 43); Army Reg. 604–10, Sec. 3, Para. 19 (a), dated July 29, 1955 (A. Br. App. 44). For the later evolution of these regulations, see *Schustack* v. *Herren*, 234 F. 2d 134, 136–138, fn. 4 (C. A. 2).

Petitioners do not contend that any of the foregoing regulations were violated in effecting their respective discharges. Instead, they ask this Court to read the pertinent statutes as precluding the issuance of the regulations authorizing petitioners' discharges in the manner in which they were accomplished;[33a] alternatively, they argue that, if the statutes may not be so read, the statutes themselves must be declared unconstitutional. Our position is that the statutes validly vest broad discretion in the Secretary of the Army to issue regulations such as those here questioned, and that the civil courts have no jurisdiction to review the manner in which the Secretary exercises this discretion, whether in establishing criteria for discharges or in applying those criteria in individual cases.

B. THE DISTRICT COURTS HAVE NO AUTHORITY TO REVIEW, CONTROL, OR COMPEL THE ACTION OF THE MILITARY IN PROVIDING FOR AND ISSUING ADMINISTRATIVE DISCHARGES

1. *Congress has never given the District Courts jurisdiction to review military discharges.* As we have

[33a] Petitioner Abramowitz further suggests (A. Br. 27, n. 14) that Army Reg. 604–10 is invalid because it has not been published in the Federal Register, citing Sections 2 and 3 of the Administrative Procedure Act, 5 U. S. C. 1001 and 1002. But Section 3, relating to publication, exempts from its requirements "any matter relating solely to the internal management of an agency"; Section 4, 5 U. S. C. 1003, requiring general notice of proposed rule making by publication in the Federal Register, exempts from its requirements "(1) any military, naval, or foreign affairs functions of the United States or (2) any matter relating to agency management or personnel * * *". Regulations pertaining to the security screening of military personnel obviously fall within both these exceptions.

seen, Congress throughout history has left all matters pertaining to the issuance of administrative discharges to the discretion of the military. Since the courts do not intervene in matters committed to executive discretion (*Wilbur* v. *United States*, 281 U. S. 206; *Louisiana* v. *McAdoo*, 234 U. S. 627, 633; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577; *Gaines* v. *Thompson*, 7 Wall. 347), Congress has traditionally viewed itself as the sole tribunal competent to correct abuses of this discretion or mistakes in its exercise. Indeed, it has been long maintained that a discharge once issued, regardless of its character, was revocable only by Act of Congress, and that even the Executive—much less the judiciary—had no authority to void a discharge once issued, in the absence of fraud. Pasley, *Sentence First—Verdict Afterwards: Dishonorable Discharges Without Trial by Court-Martial?*, 41 Cornell L. Q. 545, 578 (1956); Davis, *A Treatise on the Military Law of the United States*, 353–358 (3d ed., 1913). In the exercise of this exclusive review power, Congress has passed large numbers of private bills for the relief of persons who had received discharges other than honorable.[34] 40

[34] See, *e. g.*, the Act of April 13, 1876, c. 59, 19 Stat. 421, providing as follows:

> That the Secretary of War be, and he is hereby, directed to correct the record of the dismissal of Charles W. Mackey, first lieutenant Company C, Tenth Regiment Pennsylvania Reserve Volunteer Corps, and grant him an honorable discharge from the Army, to date July eleventh, eighteen hundred and sixty-three.

More recent examples (Acts of April 4, 1944, c. 171, 58 Stat. (pt. 2) 976, and of September 27, 1944, c. 434, 58 Stat. (pt. 2) 1022) are cited in 40 Op. A. G. 504, 505.

Op. A. G. 504, 505; *Goldstein* v. *Johnson*, 184 F. 2d 342, 343 (C. A. D. C.). This practice continued for many decades.

The notion that Congress would have expended considerable time and energy, over so long a period, in entertaining such bills if it conceived that it had already clothed the District Courts with identical jurisdiction is contrary to all concepts of the traditional function of the private bill as a means of redress where no other avenue of relief is available. And if Congress had never given the District Courts jurisdiction to review military discharges, those courts, having only such powers as Congress confers upon them, could not presume to exercise such jurisdiction. *Lockerty* v. *Phillips*, 319 U. S. 182, 187, and cases cited.

In 1946, Congress did away with its former practice of granting legislative review of military discharges by prohibiting the introduction in either House of private bills authorizing or directing the correction of a military or naval record (Legislative Reorganization Act of 1946, Sec. 131, 60 Stat. 812, 831). The purpose was to save congressional time.[11] Significantly, however, the former congressional prerogatives were not transferred to the courts; they were transferred to administrative bodies. Congress had already taken the first step in this direction in 1944 by authorizing the creation of administrative boards within each of the service departments to review administrative discharges (Servicemen's Re-

[11] S. Rep. 1400, 79th Cong., 2d sess., p. 7.

adjustment Act of 1944, Sec. 301, 58 Stat. 286, 38 U. S. C. 693h; App., *infra*, pp. 79–80), thereby providing for the relief of servicemen who considered themselves aggrieved, and at the same time doing away with the necessity for resort to Congress. 90 Cong. Rec. 4538; 40 Op. A. G. 504, 505. The pertinent debates in the House (90 Cong. Rec. 4538–4541), as well as the hearings on the 1944 bill (Hearings Before the House Committee on World War Veterans' Legislation on H. R. 3917 and S. 1767, 78th Cong., 2d sess., pp. 11–12, 40–41), bear out the view that Congress did not conceive of the courts as already having jurisdiction in this field. Nor is there the slightest evidence that Congress intended to create any new authority in the District Courts, and thus to subject the courts of the District of Columbia to an enormous flood of litigation in that field."[36] *Gentila* v. *Pace*, 193 F. 2d 924, 927 (C. A. D. C.), certiorari denied, 342 U. S. 943.

The finality clause of Section 301 of the 1944 Act, providing that the findings of the Discharge Review Boards are "to be final subject only to review by the Secretary of the Army * * *", is further evidence

[36] The following statistics indicate the enormous burden which would be assumed by the courts if they were to undertake direct review of the actions of the military in issuing less-than-honorable discharges, or review of the determinations of the Discharge Review Boards and Boards for the Correction of Military Records. Statistics for the Navy were not available for inclusion in the first two tables below.

(*1*) Total number of persons discharged annually from the Army and (from 1949 on) the Air Force, and the total of that number given less-than-honorable discharges (including Bad-Conduct and Dishonorable Discharges), from July 1, 1940 to June 30, 1957:

that Congress did not intend judicial review. *Gentila v. Pace, supra.* It is true, as petitioner Harmon points out (H. Br. 19–20), that a finality clause of this type does not by itself preclude judicial review of such administrative decisions as have been traditionally reviewable. But where judicial review has

Year	Number discharged	Number awarded less-than-honorable discharge
1940 (July through December)	46,459	3,216
1941	227,008	7,354
1942	265,267	5,476
1943	1,116,693	20,876
1944	636,551	28,009
1945	5,169,215	21,603
1946	3,763,975	16,145
1947	708,823	16,362
1948	564,564	13,934
1949	384,202	27,551
1950	386,563	26,211
1951	433,279	14,374
1952	840,910	22,021
1953	952,992	32,252
1954	848,080	39,632
1955	844,800	28,843
1956	674,768	32,847
1957 (January through June)	318,632	27,716

(*2*) Total number of less-than-honorable discharges issued by the Army and Air Force under military personnel security regulations from November 10, 1948 to August 31, 1957, in the case of the Army and October 1, 1957, in the case of the Air Force, and the number of such discharges upgraded as the result of post-discharge review by reviewing boards or by direct action of the service Secretary concerned:

General Discharges	594
Discharges under other than honorable conditions (Undesirable)	296
Number of above discharges upgraded after issuance	196

(*3*) Total number of cases disposed of by the Discharge Review Boards (Army, Navy, and Air Force), October 1944 through August 30, 1957—116,736.

(*4*) Total number of cases disposed of by the Boards for the Correction of Military or Naval Records (Army, Navy, and Air Force), June 1947 through August 30, 1957—41,850.

traditionally been absent, as here, and where a reversal of the tradition would increase the work-load of the courts by a substantial percentage, an increase which Congress did not contemplate, other considerations have been held to prevail.[36a] In such circumstances, the insertion of such a clause constitutes an additional indication of congressional intent that disputes concerning discharges are to reach their terminal point within the service departments and are not to be carried over into the courts. *Gentila* v. *Pace, supra,* at 927; cf. *Heikkila* v. *Barber,* 345 U. S. 229; *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 305; *Reaves* v. *Ainsworth,* 219 U. S. 296, 306.

The enactment of Sections 131 and 207 of the Legislative Reorganization Act of 1946 (60 Stat. 812, 831, 837) completed the transfer of congressional prerogatives relating to discharges to administrative boards. As we have noted (*supra,* p. 36), the first of these sections prohibited the introduction of private bills to correct military or naval records. Section 207 (5 U. S. C. 191a) authorized the Secretaries of the respective service departments to establish civilian boards for the correction of all such records, including, of course, military discharges. The Secretaries, acting through these independent administrative boards, were thus authorized to exercise the former congressional clemency powers and to make final and conclusive corrections of records. See 40 Op. A. G.

[36a] Compare *Heikkila* v. *Barber,* 345 U. S. 229 with *Shaughnessy* v. *Pedreiro,* 349 U. S. 48.

504, 508; 41 Op. A. G. No. 1, p. 2; 41 Op. A. G. No. 8, p. 4; 41 Op. A. G. No. 35.

Significantly for present purposes, Section 131, found in Title I of the 1946 Act, was not limited to prohibiting the introduction of private bills for the correction of military or naval records. The section listed three categories of private bills which were to be banned: bills "authorizing or directing (1) the payment of money for property damages, for personal injuries or death for which suit may be instituted under the Federal Tort Claims Act, or for a pension (other than to carry out a provision of law or treaty stipulation); (2) the construction of a bridge across a navigable stream; or (3) the correction of a military or naval record * * *". We have seen that the Act channeled future claims relating to military records to the newly-established boards for correction of military records. An analogous administrative substitute for the private bill to authorize the construction of a bridge across a navigable stream was provided for in Title V, entitled the General Bridge Act (Section 501, 60 Stat. 847), which granted blanket congressional consent to the construction of such bridges, contingent upon the approval of the location and plans by the Chief of Engineers and the Secretary of War (Section 502, 33 U. S. C. 525). As for tort claims, Title IV of the Act, entitled the Federal Tort Claims Act (Sec. 401, 60 Stat. 842), similarly authorized administrative disposition of certain claims, giving the head of each federal agency authority to determine such claims not in excess of $1,000 (Sec. 403,

60 Stat. 843). But with respect to tort claims—*and only with respect to tort claims*—Congress provided a *judicial* remedy as well as an administrative remedy. It vested original jurisdiction in the District Courts to hear and determine claims against the Government based upon the negligence of its employees, as well as jurisdiction to redetermine claims previously submitted to a federal agency under Section 403 which had been finally disposed of by the agency or which had been withdrawn by the claimant.

These provisions of the Legislative Reorganization Act of 1946 seem to us to make two conclusions inescapable. The first is that applications for authority to build bridges over navigable streams, claims for damages arising from the negligence of government employees, and claims arising from entries in military records—including discharges—were alike considered by Congress as being at that time subject only to redress in Congress and not in the courts.[37] The

[37] Congress clearly did not believe that Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009), designed to affect only the scope of judicial review and not its availability (Senate Judiciary Committee Print, June 1945, Comment on Section 10 (e), Senate Document No. 248, 79th Cong., 2d sess., p. 39; cf. pp. 83–84, 229–230, 311, 415), had provided for judicial review of the decisions of the previously authorized Discharge Review Boards. The Legislative Reorganization Act was passed less than two months after the Administrative Procedure Act. Section 207 was not included in the bill when it passed the Senate on June 10, 1946, one day prior to the approval of the Administrative Procedure Act. It was inserted subsequently by the House Committee. The court below has previously held that the Administrative Procedure Act does not authorize judicial review of correction

second conclusion is that, in transferring its former exclusive prerogatives in considering claims sounding in tort both to agency heads and to the courts, while at the same time remitting matters relating to bridges and to military records exclusively to administrative bodies, Congress plainly bespoke its intention that the courts were to have authority in the first field but not in the second and third.[37a]

2. *The courts have recognized the limitations upon their authority in this field.* (*a*) This Court has never undertaken to invalidate discharges, such as those in these cases, which are issued under the broad discretion statutorily vested in the Secretary of the Army. In *Patterson* v. *Lamb*, 329 U. S. 539, 542, the Court expressly reserved the question of "[w]hether and to what extent the courts have power to review or control the War Department's action in fixing the type of dis-

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board decisions. *Gentila* v. *Pace*, 193 F. 2d 924 (C. A. D. C.), certiorari denied, 342 U. S. 943.

[37a] The Report of the Commission on Government Security (the Wright Commission), June 1957, while criticizing the policy of the Department of Defense in considering pre-induction activity in determining the character of certain discharges, nevertheless recognizes that this policy is subject to change only by the Department itself or by Congress, and not by the courts. The Commission has drafted a proposed bill to require that military discharges be based solely upon the character of military service (Report, pp. 719, 726). Two bills embodying this provision were introduced at the last session of Congress but have not yet been acted on. H. R. 8338 and H. R. 9352, 85th Cong., 1st sess. The Commission has further recommended that the Department of Defense review its discharge policy in the light of the Commission's recommendations, and has stated that if such review does not result in the recommended change, "Congress should consider providing legislation for judicial review in cases of other than honorable discharges in loyalty separations" (Report, pp. 147–148). (The

charge certificates issued to soldiers * * *".[*] Despite this reservation, the holding in that case is typical of this Court's rulings in cases involving discharge or retirement from the armed services:—where Congress has, as here, left matters to Executive discretion, the Court has not intervened to review or control the exercise of that discretion.

In *Lamb,* the plaintiff claimed that he was entitled to an Honorable Discharge rather than the "discharge from draft" given him when the World War I Armistice was signed shortly after his induction. This Court noted that the statute requiring that soldiers be given discharge certificates—the basic discharge statute here in question—"does not particularly prescribe the types or contents of certificates authorized to be granted. But pursuant to authority granted by Congress, the War Department" had promulgated regulations establishing general categories of discharges. 329 U. S. at 542. These, said the Court, were well suited to fit discharges in the normal course of Army routine. But when the special circumstances created by the Armistice made these categories inappropriate to the cir-

term "loyalty separations" is used because the Commission recommends reverting from the present "security" standard to a "loyalty" standard.) Two bills were introduced in the last session of Congress which would give the Court of Claims (not the District Courts) "jurisdiction to review any decision of any board for the correction of military records * * *", thereby affording the opportunity for judicial review of discharges qualifiedly recommended by the Commission. H. R. 6073 and S. 2036, 85th Cong., 1st sess. Again, no action has been taken on these bills.

[*] *Patterson* v. *Lamb* was decided in January 1947 before the effect of the Legislative Reorganization Act of 1946, with respect to military discharges, could be fully considered and appreciated. See *supra*, pp. 36 *ff*, *infra*, pp. 44, 45.

cumstances of the plaintiff's disharge, the Army had authority to make special provision for this class of cases. The Court ruled that the plaintiff's discharge "adequately indicates [the] facts. The law demands no more" (329 U. S. at 545).

The Court thus avoided the necessity of deciding whether it would have the authority to set aside a discharge, issued under the same statutory authority, if the facts indicated an abuse of discretion. In reserving this question, the Court made the following footnote reference to a series of cases holding that the courts will not review matters, including military discharges, entrusted to executive discretion (329 U. S. at 542): "See *Denby* v. *Berry*, 51 App. D. C. 335, 279 F. 317, 263 U. S. 29; *Davis* v. *Woodring*, 111 F. 2d 523; *Palmer* v. *United States*, 72 Ct. Cls. 401; *Wilbur* v. *United States*, 281 U. S. 206; cf. 58 Stat. 286, 38 U. S. C. Supp. IV, § 693h".

In *Denby* v. *Berry*, *supra*, the Court of Appeals had held that the plaintiff's discharge had been in violation of a detailed retirement statute and was therefore void. The Supreme Court reversed, holding that the plaintiff had merely been placed on inactive duty, a matter uncontrolled by statute (just as are administrative discharges) and therefore within the discretion of the Secretary of the Navy. *Davis* v. *Woodring*, *supra*, like *Lamb*, was a suit for an Honorable Discharge in lieu of a "discharge from draft". The Court of Appeals for the District of Columbia Circuit held that, despite the fact that the plaintiff "served under 'honorable conditions' and was discharged only because of physical unfitness, we

cannot because of these facts interfere with the internal management of the War Department or require it to issue discharge papers contrary to its established rules. Congress having failed to prescribe the form of discharge and having left it to the discretion of the President acting through the Secretary, we are wholly without any effective power to review. * * * That this must result in the denial of veteran hospitalization to petitioner is regrettable, but beyond our control". 111 F. 2d at 525.

Palmer v. *United States, supra,* was a suit for compensation based upon the alleged illegality of a discharge from the Coast Guard. The Court of Claims ruled that, despite the fact that the Coast Guard had violated its own rules in discharging the plaintiff, "the courts will not interfere with or review the actions of proper officers in the military forces done in some administrative proceeding and not in conflict with any statute". 72 C. Cls. at 406. The ruling was based upon the holding that the rules relating to discharges "pertained solely to administrative matters and not to any duties prescribed by law". *Id.* at 405. *Wilbur* v. *United States, supra,* related to the powers of the Secretary of the Interior in dealing with Indian affairs and held that the courts have no authority to control the exercise of executive discretion by writ of mandamus. The last citation in the footnote in *Lamb* is to the statute authorizing the creation in 1944 of the Army Discharge Review Board (see *supra,* pp. 36–39).

Other rulings by this Court in discharge and retirement cases reflect the same tenor as the foregoing

decisions. In *Reaves* v. *Ainsworth,* 219 U. S. 296, the Court considered the case of an officer who claimed that he had been discharged in violation of due process of law and of the applicable statute relating to the promotion, retirement, and discharge of officers. The Army Promotion Board had found him not qualified for promotion and he was discharged. The officer petitioned the Supreme Court of the District of Columbia (now the District Court) to review the Board's decision, contending that a prior decision of the Board had entitled him, under the statute, to retirement at three-quarters pay for life. In holding that the proceedings of the Board were not subject to review by the courts, this Court said (219 U. S. 304, 305, 306):

> * * * To those in the military and naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts. * * *
>
> It is contended, however, that the board of examination did not observe the procedure required by law * * *.
>
> * * * but no fixed procedure is provided by the statute * * * by very comprehensive words power is conferred upon the President to "prescribe a system of examination of all officers of the army * * *."
>
> * * * * *
>
> If it be disputable whether these provisions guarantee to an officer "the safeguards of a trial in court," it is certain that the decision is not

final with the board but must be reported with the proceedings to the President, and may be approved or disapproved by him. *This is the only relief from the errors or the injustice that may be done by the board which is provided. The courts have no power to review.* The courts are not the only instrumentalities of government. They cannot command or regulate the army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the army. And this was the motive of the act of October 1, 1890, and naturally its accomplishment was intrusted to the President. *He executed the trust by constituting examining boards, defining their duty and reserving to himself the ultimate review of their proceedings and decision. This is the protection which the act of Congress gives to the rights conferred by it.* If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined. [Emphasis added.]

A similar result was reached in both *United States ex rel. French* v. *Weeks*, 259 U. S. 326, and *United*

States ex rel. Creary v. *Weeks*, 259 U. S. 336." In both cases, the Court ruled that the President, through the Secretary of War, had exercised the discretion vested in him by the statute in question and that the court had no jurisdiction to issue the writ of mandamus prayed for. In *Creary*, the plaintiff, a Colonel, was discharged "due to his neglect, misconduct, and avoidable habits". 259 U. S. at 342. This Court declined to review further than to determine the scope of executive discretion to discharge officers conferred by the applicable statute and the jurisdiction of the examining boards over the person and subject matter. In finding both jurisdiction and broad discretion, the Court said (259 U. S. at 343, 344):

> * * * military tribunals are as necessary to secure subordination and discipline in the Army as courts are to maintain law and order in civil life; and the experience of our Government for now more than a century and a quarter, and of the English Government for a century more, proves that a much more expeditious procedure is necessary in military than is thought tolerable in civil affairs * * *. It is difficult to imagine any process of government more distinctively administrative in its nature and less adapted to be dealt with by the processes of civil courts than the classification and reduction in number of the officers of the Army * * *. In its nature it belongs to the executive and not to the judicial branch of the Government.
>
> In the present case it is admitted that the relator was given full opportunity to be heard

[39] See also *Rogers* v. *United States*, 270 U. S. 154.

> and that he was heard by * * * the only [tribunal] * * * which the act of Congress requires shall give him a hearing. The various boards * * * each certainly had jurisdictio. over the person of the relator as an army officer and over the subject of the inquiry, * * * and * * * the right dealt with was distinctly military in its nature, affecting the status in the Army of a soldier, and it is entirely clear that the boards * * * did not exceed the powers conferred upon them. Such being the case, the Supreme Court of the District was without power to review or in any manner control the conduct of the boards or the result of their action.

It is noteworthy that all of the cases we have just discussed related to actions by the military in terminating the complainant's military connection, and that consequently the complaints, just as those of the petitioners here, were (with the exception of *Palmer*) directed to the post-separation, civilian, effects of these actions rather than to their impact upon the continuing military careers of the complainants. In each case, the complainant had a substantial stake, monetary or otherwise, in the manner in which his separation was accomplished. The courts nevertheless consistently relied upon the intimate connection between separation procedures and matters of discipline and internal military management to support their refusal to grant judicial review.

While the recent case of *Orloff* v. *Willoughby*, 345 U. S. 83, was an action for a writ of habeas corpus for a discharge from the Army, rather than a suit

based upon an executed discharge, it is nonetheless pertinent here because again this Court went no further than to determine the scope of discretion over matters of internal Army management vested by statute in the military authorities. The Court held that the Doctors' Draft Act did not require that the Army either commission or discharge a doctor drafted under its terms and affirmed the denial of habeas corpus, despite the Court's assumption that the petitioner was "correct in stating that it has been a uniform practice to commission Army doctors" (345 U. S. at 88). In disposing of the argument that it could review the petitioner's duty assignment, the Court said (345 U. S. at 93–94):

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to

its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.

(*b*) The lower courts have consistently followed the principles of these cases in disposing of suits specifically seeking judicial review of allegedly unlawful military discharges. *Gentila* v. *Pace, supra; Davis* v. *Woodring, supra; Stock* v. *Department of the Air Force*, 186 F. 2d 968 (C. A. 4); *Hurley* v. *United States ex rel. Gladman*, 47 F. 2d 431 (C. A. D. C.); *Brown* v. *Royall*, 81 F. Supp. 767 (D. D. C.), affirmed, C. A. D. C., October 13, 1949, certiorari denied, 339 U. S. 952, rehearing denied, 339 U. S. 991; *Marshall* v. *Wyman*, 132 F. Supp. 169 (N. D. Cal.); *Nordmann* v. *Woodring*, 28 F. Supp. 573 (W. D. Okla.); *Reid* v. *United States*, 161 Fed. 469 (S. D. N. Y.), writ of error dismissed, 211 U. S. 529; *Palmer* v. *United States*, 72 C. Cls. 401; *Newton* v. *United States*, 18 C. Cls. 435; *Nistal* v. *Hausauer*, 308 N. Y. 146, certiorari denied, 349 U. S. 962; cf. *Bland* v. *Hartman*, 245 F. 2d 311 (C. A. 9); *Goldstein* v. *Johnson*, 184 F. 2d 342 (C. A. D. C.); see also *Bernstein* v. *Herren*, 234 F. 2d 434 (C. A. 2), certiorari denied, 352 U. S. 840; *Schustack* v. *Herren*, 234 F. 2d 134 (C. A. 2); *Bolger* v. *Marshall*, 193 F. 2d 37 (C. A. D. C.); but compare *McTernan* v. *Rodgers*, 113 F. Supp. 638 (N. D. Cal.). In *Gentila, supra*, for example, the court below ruled that Congress intended the decisions of the Army Discharge Review Board to be final and unreviewable in the courts. The same court had earlier decided in *Gladman, supra*, that it had no power

to review because the question to be determined, relating to the plaintiff's discharge, "affected the status of the relator in the National Guard as a soldier, and was therefore distinctly military in its nature" (47 F. 2d 433). In *Reid* v. *United States, supra*, the District Court held that "[t]he exact method of this soldier's discharge and the quantum or kind of character that should be given him, not being regulated by statute, must necessarily be left in the discretion of the executive officer having power to grant some kind of discharge. That it is beyond the power of the judicial branch to coerce or review the discretion of the executive is familiar doctrine, while that a discharge with a very bad character is not a punishment to the man discharged within the meaning of any federal statute is settled by *U. S.* v. *Kingsley*, 138 U. S. 87 * * *" (161 Fed. at 472). Similar statements may be found in the *Marshall, Newton* and *Nistal* cases, *supra*. These lower court rulings all bear out our contention that the courts have no jurisdiction to review the administrative issuance of military discharges, because Congress has vested unfettered discretion in the Executive and has established an exclusive administrative method of review, as well as because no legal injury results from the issuance of such discharges (see *infra*, pp. 58 *ff*).

(*c*) In their efforts to establish jurisdiction to review administrative discharges, petitioners rely, *inter alia*, upon cases in which the courts have reviewed the proceedings of courts-martial or military commissions (H. Br. 19, 23; A. Br. 10). But in those cases, where liberty or life itself are at stake, this

Court has found authority to review in the broad power of the courts to issue writs of habeas corpus to free persons illegally held in custody. *Ex parte Milligan,* 4 Wall. 2 (military commission); *Ex parte Mason,* 105 U. S. 696, 697 (question of jurisdiction to issue writ reserved, "inasmuch as [the Court] has no power to review the judgments of courts-martial"); *Wales* v. *Whitney,* 114 U. S. 564; *In re Grimley,* 137 U. S. 147; *Johnson* v. *Sayre,* 158 U. S. 109; *Carter* v. *Roberts,* 177 U. S. 496; *Carter* v. *McClaughry,* 183 U. S. 365; *McClaughry* v. *Deming,* 186 U. S. 49; *Givens* v. *Zerbst,* 255 U. S. 11; *Collins* v. *McDonald,* 258 U. S. 416; *Ex parte Quirin,* 317 U. S. 1 (military commission); *In re Yamashita,* 327 U. S. 1 (military commission); *Wade* v. *Hunter,* 336 U. S. 684; *Humphrey* v. *Smith,* 336 U. S. 695; *Hiatt* v. *Brown,* 339 U. S. 103; *Whelchel* v. *McDonald,* 340 U. S. 122; *Gusik* v. *Schilder,* 340 U. S. 128; *Burns* v. *Wilson,* 346 U. S. 137; *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11; *Reid* v. *Covert,* 354 U. S. 1.

And despite this finding of jurisdiction under the *habeas corpus* statute, the Court in such cases has narrowly confined the limits of its powers. "It is well settled that 'by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial * * *. The single inquiry, the test, is jurisdiction'. *In re Grimley,* 137 U. S. 147, 150 (1890)." *Hiatt* v. *Brown,* 339 U. S. 103, 111; see also *Swaim* v. *United States,* 165 U. S. 553, 555; Note, 67 Harv. L. Rev. 91, 160–162 (1953);

Rossiter, *op. cit. supra*, pp. 102–120. These cases establish that if the court-martial has jurisdiction of the person, jurisdiction of the offense charged, jurisdiction to impose the sentence adjudged, and is properly constituted, the civil courts have no authority to intervene. Thus in a recent case in which the petitioners had been sentenced to death by a court-martial, Chief Justice Vinson said, in affirming the dismissal of applications for writs of habeas corpus (*Burns* v. *Wilson*, 346 U. S. 137, 139–140):

> * * * the law which governs a civil court in the exercise of its jurisdiction over military habeas corpus applications cannot simply be assimilated to the law which governs the exercise of that power in other instances. It is *sui generis*; it must be so, because of the peculiar relationship between the civil and military law.
>
> Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment [citing, *inter alia*, *Reaves* v. *Ainsworth*, 219 U. S. 296]. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.

We have noted that the limited judicial review of court-martial sentences is founded upon express authority to issue writs of habeas corpus, conferred by statute. We submit that there is no such analogous authority and no express grant of District Court jurisdiction upon which to base review of military discharges administratively issued. And even if a court were to have such jurisdiction, the scope of review would surely not exceed that accorded in court-martial cases. Under such a standard, relief is precluded in the circumstances of the present cases, where the Army concededly had jurisdiction of petitioners, concededly had jurisdiction to determine whether their retention in the Army was clearly consistent with the interests of national security, and concededly had jurisdiction to discharge petitioners with some form of administrative discharge. The type and character of those discharges is left by statute to the discretion of the respondent. The cases we have cited above stand, at most, for the proposition that the courts only have authority to review or control the actions of the military if there is a strong showing that the action complained of exceeds the jurisdictional limits imposed upon the military.

Petitioners also cite as authority for judicial review of their military discharges cases involving administrative action in dealing with the rights or privileges of civilians[41] (H. Br. 18–23; A. Br. 9–12). As

[41] The selective service cases are in this category since the petitioning defendants in those cases were civilians who had been convicted by District Courts of refusing to submit to in-

we have shown above, very different considerations control the question of judicial review of the discretion of the Secretary of the Army exercised in discharging one admittedly a member of the Army.[a] The court below has aptly summarized the point (H. R. 123):

> * * * Reason, flowing from the doctrine of the separation of powers, dictates that in many fields the administrative discretion of the executive branch and the legislative discretion of the legislative branch be not subject to interference or review by the courts. In no field is this doctrine more pertinent and important than in the operation of the armed forces. Provisions for the establishment and operation of such forces necessary to the security of this country are wholly legislative matters, and the administration of those forces is the very es-

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duction under the Selective Service Act. See *Estep* v. *United States*, 327 U. S. 114; *Sicurella* v. *United States*, 348 U. S. 385; *Simmons* v. *United States*, 348 U. S. 397; *Gonzales* v. *United States*, 348 U. S. 407, cited at H. Br. 19–20 and A. Br. 12.

[a] Even as to civilian matters there are, of course, many administrative decisions which, because of the nature of the subject matter, separation-of-powers considerations, or the intent of Congress, are not subject to judicial review. See, *e. g.*, *United States* v. *Carmack*, 329 U. S. 230, 242–243; *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 543; *Ludecke* v. *Watkins*, 335 U. S. 160, 163–166; *Z. & F. Assets Realization Corp.* v. *Hull*, 311 U. S. 470, 489; *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 303; *Butte, Anaconda & Pacific Ry. Co.* v. *United States*, 290 U. S. 127, 136, 143; *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502, 507; *United States* v. *Chemical Foundation*, 272 U. S. 1, 15; *Dakota Central Telephone Company* v. *South Dakota*, 250 U. S. 163, 184; *United States ex rel. Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324–325; *Martin* v. *Mott*, 12 Wheat. 19, 31–32.

sence of executive action. The Constitution so provides. Only in the most extreme cases can the judiciary interfere in this area. As a practicality the operation of military forces requires expeditious, sometimes instant, action and thus requires discipline. From the standpoint of the Army it is easy to see the disastrous effect upon discipline if the type of discharge which could be given an enlisted man were not within the power of the commanding officer or the Secretary, but were subject to litigation and to review and decision by a court wholly removed from the necessities of military affairs. As a further matter of practicality, from the standpoint of the courts review of such matters would impose an appalling burden, with which the courts are wholly unequipped to cope.

Even as to matters in a somewhat analogous civilian field, the discharge of civil service employees, the courts have narrowly circumscribed their own function. In the absence of legislative restraint upon the executive's discretionary power to remove inferior government officers and employees, the courts have consistently refused, since the founding of the Republic, to supervise the action of executive officials. Where Congress has specified the grounds of removal and prescribed certain procedures, the function of the judiciary has been held to be exhausted upon a determination that the mandate of Congress has been complied with. At no time have the courts intervened to review the basis for the executive action. *Eberlein* v. *United States*, 257 U. S. 82; *Burnap* v. *United*

States, 252 U. S. 512; *Brown* v. *Lane*, 232 U. S. 598; *Reagan* v. *United States*, 182 U. S. 419; *Keim* v. *United States*, 177 U. S. 290; *White* v. *Berry*, 171 U. S. 366; *Crenshaw* v. *United States*, 134 U. S. 99; *In re Sawyer*, 124 U. S. 200; *Matter of Hennen*, 13 Pet. 230; *United States* v. *Guthrie*, 17 How. 284.

In the present cases, Congress has declined to prescribe grounds for removal or the types of discharge to be given, and has specified minimal procedures within the service, all of which have been complied with. Congress has also prescribed administrative remedies which it has deemed exclusive. Petitioners here ask the courts to disregard those limitations and to go far beyond the limits even in civilian employee cases to review, in effect, the validity of the grounds upon which their less-than-honorable discharges were based. There is no authority for such review, and no basis for judicial intervention.

II

THE DISCHARGES ISSUED TO PETITIONERS DO NOT FURNISH A BASIS FOR CLAIMS UPON WHICH RELIEF MAY BE GRANTED SINCE THEY DO NOT INVADE ANY LEGALLY PROTECTED RIGHTS OF PETITIONERS

Even if the administrative issuance of military discharge certificates were not inherently immune from judicial review, petitioners still would not be entitled to relief. As in every action in the federal courts, petitioners must present a justiciable case or controversy. "The touchstone to justiciability is injury to a legally-protected right * * *" (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 140–

141). In the absence of a showing of such injury, the Court will not pass upon statutory or constitutional issues. *Coffman* v. *Breeze Corporations*, 323 U. S. 316, 324–325. In *United Public Workers* v. *Mitchell*, 330 U. S. 75, 89–90, this Court said:

> The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. * * * It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other.

Petitioners have failed to show such actual prejudicial interferences or injuries flowing from their military discharges. Their speculative contentions as to future adversities, arising from the possible loss of state veterans' benefits and from apprehension of lowered community esteem, are not injuries of the kind which give rise to federal jurisdiction. Nor are generalizations about deprivations of civil rights sufficient.

A. THE ISSUANCE OF LESS-THAN-HONORABLE DISCHARGES TO PETITIONERS HAS NOT CAUSED LEGAL INJURY

1. *The possible denial of state benefits.* Both petitioners concede, expressly (H. Br. 33) or by implication (A. Br. 15), that they are eligible for the statutory veterans' benefits administered by the Federal

Government. This is so because Harmon's General Discharge (under honorable conditions) entitles him "to full rights and benefits" (Army Reg. 615–360, Para. 7, *supra*, fn. 30, p. 32; see also Table, "Incidents of Discharge", H. R. 59), and because Abramowitz's earlier honorable separation from active duty has the same effect.[43] Petitioners are therefore forced to argue that the possible loss of New York State veterans' benefits constitutes legal injury remediable in the federal courts (H. Br. 33; A. Br. 15–16). To this there are several answers.

First, petitioners' claims are purely speculative and therefore furnish no basis for relief. *United Public Workers* v. *Mitchell, supra.* There is no showing that they have been denied state benefits; no certainty that they will ever have occasion to apply for such benefits as scholarships, civil service preferences, or early retirement from the school system; and even less certainty that their applications would be denied if submitted. Petitioners' eligibility for these benefits depends, of course, upon the State's construction of its own statutes. It is entirely possible that the phrase "honorably discharged" which appears in some of these statutes would include a discharge under honorable conditions, such as Harmon's, or Abramowitz's original discharge.[44] See, *e. g.*, N. Y. Gen. Bus.

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[43] See Appendix B, *infra*, pp. 82–88.

[44] Harmon misquotes the statutes cited on page 33 of his brief. He states that certain benefits are available only to "veterans holding 'honorable discharge' certificates", implying that these would not be available to a veteran discharged, as he was, with a "General Discharge (under honorable conditions)". But these statutes state that the benefits are available to "honorably dis-

Law, Sec. 32, McKinney Bk. 19; N. Y. Mil. Law, Sec. 245, McKinney Bk. 35. We know of no New York authority to the contrary. Indeed, as to both Harmon and Abramowitz, it is highly probable that State officials will accord the same efficacy to Harmon's General Discharge and to Abramowitz' honorable separation from active duty as does the Federal Government.[45] *Horylev* v. *New York State Bonus Commission*, 220 App. Div. 345, 221 N. Y. S. 548, relied upon by petitioner Abramowitz (A. Br. 16), indicates that this would be the case.[46]

In any event, these veterans' benefits "are gratuities. They involve no agreement of parties; and the grant of them creates no vested right". *Lynch* v. *United States*, 292 U. S. 571, 577; *Slocumb* v. *Gray*, 179 F. 2d 31, 34 (C. A. D. C.). Even if petitioners were to be denied such benefits they could not claim a

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charged" veterans, in which category he falls. N. Y. Gen. Mun. L. Sec. 148; N. Y. Educ. L. Sec. 609; N. Y. Mil. L. Sec. 245. The fourth statute cited, N. Y. Mil. L. Sec. 250, was amended by L. 1954, c. 431 to permit the recording of "Any certificate * * * of the honorable separation from or service in the armed forces * * *".

[45] We cannot agree with Harmon that "New York statutes make a marked distinction between an 'honorable discharge', and a discharge 'under honorable conditions'. See, *e. g.*, and compare *N. Y. Educ. L.*, § 608 with *N. Y. Educ. L.* § 609 * * *" (H. Br. 33, n. 14): Neither quoted phrase appears in either statute. The former speaks of "a discharge certificate other than honorable", the latter of "honorably discharged veterans". We do not read the language of either section as necessarily referring only to an "Honorable Discharge" and not to a "General Discharge (under honorable conditions)".

[46] Abramowitz contends that New York benefits turn on the character of discharge from the Army and not of release from active service. But the very statute quoted in his next sentence

deprivation of justiciable property rights.[47] Moreover, it is hardly likely that the justiciability in a federal court of the character of a United States Army discharge could turn upon the availability or lack of availability of veterans' gratuities in the particular soldier's state of domicile.

2. *The alleged stigma of a less-than-honorable discharge.* Petitioners' chief claim of injury is based upon the social stigma and economic prejudice which they allege will result from their receipt of discharge certificates reciting "General Discharge (Under Honorable Conditions)" (H. R. 112) and "Undesirable Discharge" (A. R. 10), respectively, rather than certificates reciting "Honorable Discharge * * * awarded as a testimonial of Honest and Faithful service".[48] It may well be that a General or Undesirable Discharge Certificate shown to a potential employer, whether in the Government or elsewhere, might dispose him against hiring an applicant who has been so discharged. The same result may follow from a discharge for cause from civilian government or private employment, as the court below pointed out (H. R. 126). But these disadvantageous possibilities are not

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refutes this: "a member of the armed forces of the United States who served therein in time of war, who was honorably discharged *or released under honorable circumstances from such service*"—not "released from such armed forces" (A. Br. 15).

[47] The actions of the United States Veterans Administration in granting or denying applications for benefits administered by it are, of course, not subject to judicial review. 38 U. S. C. 11a-2 and 705; *Lynch* v. *United States*, 292 U. S. 571, 587; *Hahn* v. *Gray*, 203 F. 2d 625, 626 (C. A. D. C.).

[48] These words appear on the Honorable Discharge Certificate, DD Form 256A.

legal consequences of the prior discharge. Petitioners cite no statutes or regulations, federal or state, which prohibit persons with discharges such as theirs from practicing whatever professions they choose, or which otherwise restrict them in any manner. Any embarrassment petitioners may encounter is *damnum absque injuria.* Cf. *Angilly* v. *United States,* 199 F. 2d 642, 644 (C. A. 2).

And, once again, the purported injuries are at most speculative. This is particularly true in Harmon's case, where there has been no showing whatsoever that stigma results from a "General Discharge (under honorable conditions)" or that the public distinguishes between this and an Honorable Discharge. The Honorable Discharge doubtless carries some prestige which the General Discharge lacks, since it bears on its face the words "awarded as a testimonial of honest and faithful service". But this difference does not mean that *stigma* attaches to the General Discharge under honorable conditions.

If petitioners' contentions in this regard were to be sustained, *every* soldier issued a discharge less than honorable, on whatever grounds, suffers legal injury entitling him prima facie to a judicial determination of the validity of his discharge. See H. Br. 35. We cannot believe that this is so.

B. THE NOTATION "AR 604–10 APPLIES" ON PETITIONER ABRAMOWITZ'S DISCHARGE CERTIFICATE HAS NOT CAUSED LEGAL INJURY

1. *Petitioners have not been unlawfully "defamed".* Petitioners assert that the notation "AR 604–10 applies" on a discharge certificate is equivalent to a no-

tation "Discharged under the Army's Personnel Security Regulations"; that this interpretation is in turn equivalent to a notation "Disloyal" or "Subversive"; and that therefore the notation "AR 604–10 applies" compounds the purported stigma of a less-than-honorable discharge by affixing a "badge of infamy".[40] In fact, the most that can be said of the notation is that it indicates a finding that petitioners' retention in the Army has been found to be "not clearly consistent with the interests of national security". The specific factors which led to this conclusion are not indicated upon the discharge certificate, report of separation, or in any other public record. Reduced to its essentials, petitioners' argument in this respect is that the Army cannot state the reasons for its action when it discharges a soldier, without being guilty of publishing an unlawful defamatory finding.

Petitioners rely primarily upon *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 140, *Wieman* v. *Updegraff*, 344 U. S. 183, 191, and *Peters* v. *Hobby*, 349 U. S. 331, 347, as establishing a right to

[40] Petitioner Harmon's General Discharge Certificate contains no analogous notation (H. R. 112), nor does the accompanying Report of Separation (H. R. 111). He nevertheless takes the peculiar position that the Court must assume that such allegedly unlawful notations, necessary to establish his arguments relating to the "stigma" of a discharge certificate publicizing its security basis, have been inserted by the Army. He cites as authority for this proposition three cases in which the Court applied the presumption of administrative regularity and legality—not of purported illegality. See H. Br. pp. 42–43. Despite the inapplicability of this issue to Harmon's case, we shall nevertheless continue to refer to "petitioners", both in order to avoid confusion and because Harmon discusses this point at length as if the notation had been made in his case.

freedom from government defamation applicable to their cases (H. Br. 27, 40, 41, 43; A. Br. 7, 13, 22). In *Joint Anti-Fascist*, the petitioners had each been designated as "Communist" organizations (341 U. S. at 125); in *Wieman*, the Court said that when a person is "excluded from public employment on *disloyalty* grounds * * * the stain is a deep one; indeed, it has become a badge of infamy" (344 U. S. at 190–191; emphasis added); and *Peters* reiterated that "'a badge of infamy' attaches to a public employee found *disloyal*" (349 U. S. at 347; emphasis added). In *Joint Anti-Fascist* and *Peters*, it was assumed that the determinations involved might be actionable defamation *if they were unauthorized*. Assuming that rule, the determinations in the present cases were validly authorized and petitioners do not challenge their separation from the service on security grounds[**] (*supra*, pp. 20–21).

No principle is better settled than that the Executive Branch has plenary and exclusive power to determine, within such limitations as may be imposed by Congress or the Constitution, which of its personnel shall be retained in its service and which shall be separated in order to promote the efficiency of the service. *Eberlein* v. *United States*, 257 U. S. 82, and other cases cited, *supra*, pp. 57–58. A *fortiori*, the same branch has co-extensive authority to determine who shall be separated in order to promote the security

[**] Petitioner Harmon quotes the following (H. Br. 8, n. 2) from the District Court opinion: "'* * * [I]n its argument [the Government] concede[d] that it has never found [petitioner] either disloyal or loyal.' (137 F. Supp. 475, 477.)"

of the service and of the Government. In the former class of cases, the determination upon which the discharge is based is not actionable; indeed, the courts have refused to grant relief to civil servants dismissed on charges involving serious criminal misconduct, such as the acceptance of bribes (*Eberlein* v. *United States*, *supra*), illegally withholding collected customs duties (*Angilly* v. *United States*, 199 F. 2d 642 (C. A. 2)), violation of the prohibition laws (*Croghan* v. *United States*, 116 C. Cls. 577), and repeated attempts at seduction by force (*Golding* v. *United States*, 78 C. Cls. 682, certiorari denied, 292 U. S. 643; see Transcript of Record in No. 907, October Term, 1933, pp. 5–6). The same is true even where it is conceded that executive discretion has been erroneously exercised. *Eberlein* v. *United States*, *supra*; cf. *Ginn* v. *United States*, 110 C. Cls. 637; *Kellom* v. *United States*, 55 C. Cls. 174.

The same rules must apply to military dismissals to promote the security of the service and nation. Petitioners therefore do not contest the absolute power of the respondent to determine that their retention was inconsistent with security, on the basis of the information relied on, and to effect their dismissals accordingly, subject only to compliance, as here, with such procedures as Congress has prescribed.[30] Petitioner Abramowitz's necessary conces-

[30] Petitioners' claims thus stand in sharp contrast to those presented in the *Joint Anti Fascist*, *Bailey*, *Peters*, and *Wieman* cases, in all of which questions of basic power were raised. The same may be said of other cases relied on by petitioners. See, *e. g.*, *United States* v. *Lovett*, 328 U. S. 303; *American Communications Association* v. *Douds*, 339 U. S. 382; *Garner*

sion is worth repeating here (see *supra*, p. 21): "For present purposes, we can assume that the Army has an absolute right to discharge any member of the Armed Forces for any reason which, in its unrestricted judgment, seems to be necessary for its best interests" (A. Br. 25). Similar concessions are made by Harmon.[51] Petitioners' claims of actionable defamation therefore rest upon admittedly valid determinations, made by government officials concededly acting within the scope of their lawful authority, published in the form of the notation, "AR 604–10

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v. *Board of Public Works of Los Angeles*, 341 U. S. 716; *Adler* v. *Board of Education*, 342 U. S. 485; *Barsky* v. *Board of Regents*, 347 U. S. 442; *Galvan* v. *Press*, 347 U. S. 522; *Cole* v. *Young*, 351 U. S. 536; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Konigsberg* v. *State Bar*, 353 U. S. 252; *Watkins* v. *United States*, 354 U. S. 178; *Sweezy* v. *New Hampshire*, 354 U. S. 234; *Barsky* v. *United States*, 167 F. 2d 241 (C. A. D. C.), certiorari denied, 334 U. S. 843; *Nathan* v. *Dulles*, 129 F. Supp. 951 (D. D. C.), appeal dismissed, 225 F. 2d 29 (C. A. D. C.); *Shachtman* v. *Dulles*, 225 F. 2d 938 (C. A. D. C.); *Boudin* v. *Dulles*, 136 F. Supp. 218 (D. D. C.), modified, 235 F. 2d 532 (C. A. D. C.); *Parker* v. *Lester*, 227 F. 2d 708, on remand, 141 F. Supp. 519 (N. D. Cal.), affirmed, 235 F. 2d 787 (C. A. 9).

[51] Harmon's brief includes the following statements: "While Congress may have authorized the Secretary of Defense to remove 'security risks' from the Armed Forces, Congress did not, and could not, authorize him or the Secretary of the Army * * * to stigmatize an inductee * * *" (H. Br. 15); "The constitutional protection[s] * * * are applicable, not to petitioner's separation * * * but to the stigmatization of his record * * *" (H. Br. 16); "Petitioner concedes that the Directive, to the extent it requires the removal of any soldier from the Army where retention is 'not clearly consistent with the interests of national security' is validly authorized" (H. Br. 25); "We agree that respondent is authorized to separate petitioner from the Army establishment for any reason deemed appropriate,

applies".[52] That such valid official action by the head of an Executive Department cannot serve as the basis for a cause of action in defamation has been conclusively established by the courts. *Spalding* v. *Vilas*, 161 U. S. 483; *Mellon* v. *Brewer*, 18 F. 2d 168 (C. A. D. C.), certiorari denied, 275 U. S. 530; *Glass* v. *Ickes*, 117 F. 2d 273 (C. A. D. C.), certiorari denied, 311 U. S. 718; *Gregoire* v. *Biddle*, 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949; *Cooper* v. *O'Connor*, 99 F. 2d 135, certiorari denied, 305 U. S. 643; *Farr* v. *Valentine*, 38 App. D. C. 413; *De Arnaud* v.

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including reasons of 'national security'" (H. Br. 31): "Petitioner does not complain of the fact of his separation from the Army. He complains only of the 'badge of infamy' he must wear * * *" (H. Br. 40); "Whatever a 'security risk' is, we agree that the courts cannot compel the Army to retain 'one' in its service. * * * Petitioner took pains to make clear below that * * * his case had nothing to do with his retention * * * or discharge * * *. It was applicable only to the 'badge of dishonor' * * *" (H. Br. 46); "The Army had the power to discharge Harmon if it was not satisfied to keep him in the service, but it could not discharge him and defame him at the same time" (H. Br. 47).

[52] It is significant to note in this connection the relief for which petitioners pray. They seek only Honorable Discharges, free from notations. Since they acknowledge the unassailability of the Secretary's determinations, petitioners do not ask that these determinations be stricken from their military records. Compare *Bailey* v. *Richardson*, 182 F. 2d 46, affirmed by an equally divided court, 341 U. S. 918 (Transcript of Record, No. 49, October Term, 195[illegible] p. 16); *Peters* v. *Hobby*, 349 U. S. 331, 349. And presumably because admittedly lawful determinations may not be expunged from the records, petitioners do not pray for injunctions restraining the Secretary of the Army or his subordinates from divulging the grounds for petitioners' discharges to persons who might inquire why petitioners were discharged before the expiration of their normal terms of service.

Ainsworth, 24 App. D. C. 167, appeal dismissed, 199 U. S. 616.

Moreover, there is nothing inherently defamatory in the determinations that petitioners' continued retention was "not clearly consistent with the interests of national *security*". [Emphasis added.] Certainly, this determination cannot be automatically equated, as Harmon attempts to do,[53] with those involved in the *Joint Anti-Fascist* case ("Communist"), the *Bailey* case (reasonable grounds for belief that the petitioner was *disloyal*),[54] or the *Peters* case (reasonable doubt as to *loyalty*). Nor can it be said that the possible stigma arising from such a determination is any greater than that attached to a refusal to sign an oath denying membership in the Communist Party, by one whose position is such that the oath requirement may not be simply ignored. Cf. *American Communications Association* v. *Douds*, 339 U. S. 382; *Gerende* v. *Board of Supervisors*, 341 U. S. 56; *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716.

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[53] Harmon makes the bold assertion that (H. Br. 40–41) "It has been clearly settled that executive action resulting in a determination that an organization or individual is disloyal, subversive *or a 'security risk'* cannot be made without some sort of hearing. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123" (emphasis added). This is indeed a broad reading of that case. Harmon obviously does not mean what he says, since he has no objection to being discharged from the Army on a security determination, without a hearing, so long as he receives an Honorable Discharge.

[54] In *Bailey* it was held by the Court of Appeals that even the finding in that case did not give rise to legal injury. Cf. *Angilly* v. *United States*, *supra*.

Petitioners' notion that a determination that a particular individual's presence in the Armed Forces is undesirable from a security standpoint—a determination which is concededly lawful in itself—must be forever cloaked in secrecy by the Government, at the risk of being compelled to provide "all the safeguards of a judicial trial, or * * * of a General Court-Martial" (H. Br. 41), is difficult to comprehend. The Government, whether through one of the Armed Services or the Selective Service System, must at one time or another render a judgment as to the fitness, from a security standpoint, of every male who qualifies for military service under the Universal Military Service and Training Act. As Judge Prettyman pointed out below, an adverse determination of this question at the induction center may prove more onerous than such a determination after induction (H. R. 126):

> Stigma attaches on rejection from military service as a security risk. Indeed, if one be rejected entirely, on account of being a security risk, the adverse effects are greater than upon receiving a General Discharge Under Honorable Conditions. Many benefits attach to status under the latter which do not attach to rejection. And the intangibles of stigma attach in either event. Nevertheless it certainly cannot be urged that the Army may not reject, without judicial review, as a security risk one registered for service.

2. *Petitioners have not suffered "punishment" in the legal or constitutional sense.* Closely related is the claim that the General and Undesirable Discharges and the notation "AR 604–10 applies" con-

stitute "punishment" for petitioners' pre-induction activities, and that the action of the Secretary of the Army therefore violates the constitutional prohibitions against bills of attainder and *ex post facto* laws (H. Br. 15–16, 22–24, 43–48; A. Br. 6–7, 13–30). That a possible stigma arising from a security finding is not such "punishment" is evidenced by what we have already said (*supra*, pp. 62–70); moreover, the theory that an administrative discharge, even an Undesirable one, is "punishment" in the legal or constitutional sense has been rejected alike by Congress and the courts.

The statutes cited and discussed *supra at* pp. 23–30, show that Congress recognizes only two kinds of punitive discharges, Bad-Conduct and Dishonorable, both issued pursuant to court-martial sentences. "Administrative discharges"—including Undesirable Discharges—are authorized for issuance when a court-martial sentence of punitive discharge is set aside. See *supra*, pp. 26–27, n. 20. The Army likewise views administrative discharges as non-punitive: "Administrative elimination is not punishment. The fact that an undesirable discharge may be awarded which may later penalize an individual, is immaterial from the standpoint of elimination of the undesirable individual." Army Reg. 635–208, Para. 9 (e). The New York Court of Appeals drew this same line in *Nistal* v. *Hausauer*, 308 N. Y. 146, 154, certiorari denied, 349 U. S. 962:

> * * * the distinction seems plain that a dishonorable discharge has always been considered punishment for wrongdoing, whereas a discharge without honor means only that the sol-

> dier is being discharged without the kind of commendation involved in an honorable discharge.

And in *United States* v. *Kingsley*, 138 U. S. 87, 89, 92, this Court ruled that a marine discharged as "unfit for service, character bad", as the result of a series of offenses but without court-martial proceedings, was not "discharged * * * by way of punishment for an offence" so as to render him subject to a statutory forfeiture of travel pay and subsistence. See also *Reid* v. *United States*, 161 Fed. 469 (S. D. N. Y.), writ of error dismissed, 211 U. S. 529; Howland, *op. cit. supra*, p. 435; Winthrop, *op. cit. supra*, p. 549; Davis, *A Treatise on the Military Law of the United States*, pp. 353, 356 (3d ed., 1913); Pasley, *op. cit. supra*, 41 Cornell L. Q. 545, 552–568.

Since the discharges here do not constitute "punishment", there is plainly no bill of attainder or unlawful *ex post facto* action (see H. Br. 40–45;[55] A. Br. 27). A bill of attainder within the constitutional prohibition is "a legislative act which inflicts punishment without a judicial trial". *United States* v. *Lovett*, 328 U. S. 303, 315; *Cummings* v. *Missouri*, 4 Wall. 277, 323. These discharges do not inflict punishment within the holdings in *Lovett* and *Cummings*. Moreover, this is not "legislative action" in the bill-of-attainder sense, even though the administrative action is authorized by statute. While the court

[55] Although the cited pages of the Harmon brief are headed "A. With Respect to the Sixth Amendment", the discussion relates primarily to bills of attainder and the cases cited generally relate to this area; none involves the Sixth Amendment.

below in *Bailey* v. *Richardson,* 182 F. 2d 46, 54–55, affirmed by an equally divided court, 341 U. S. 918, held that a three-year proscription from Government employment administratively imposed upon grounds of disloyalty was not authorized by Act of Congress or executive order and analogized it to a bill of attainder by reference to the *Lovett* case, the court distinguished a general order barring persons from Government employment which "might well be valid" from the one imposed upon Miss Bailey "as a matter of individual adjudication". Here, the Secretary's action was authorized, there is no proscription, and the regulations are of general applicability. And while the discharges here at issue were based upon previous activities of petitioners, the absence of "punishment" renders such actions immune from invalidation on *ex post facto* grounds. Cf. *American Communications Association* v. *Douds,* 339 U. S. 382, 413–414; *Garner* v. *Board of Public Works of Los Angeles,* 341 U. S. 716, 722; *Hawker* v. *New York,* 170 U. S. 189, 196–197; *Marcello* v. *Bonds,* 349 U. S. 302, 314; *Mahler* v. *Eby,* 264 U. S. 32, 39.

For the same reasons, there is no necessity to impose upon the charges and proceedings here involved the requirements of a criminal indictment and trial, as petitioners would do (H. Br. 15–16, 40–45, 47; A. Br. 7, 21–24, 27–30). Discharge proceedings are of course not criminal proceedings, and the charges made are not criminal charges. That the Sixth Amendment confers rights only in criminal prosecutions has long been settled. *United States* v. *Zucker,* 161 U. S. 475; *Hepner* v. *United States,* 213 U. S. 103; *Oceanic Navigation Co.* v. *Stranahan,* 214

U. S. 320, 337–338; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 174, 180, concurring opinion of Mr. Justice Douglas. Once again, the absence of the essential factor of "punishment" precludes any possibility of constitutional invalidity. Cf. *Ullman* v. *United States*, 350 U. S. 422, 430–431.[56]

[56] Petitioner Abramowitz complains of the "vagueness" of the criteria utilized in determining whether an individual's retention is consistent with security, as found in Army Reg. 604–10, Sec. 13b (A. Br. App., pp. 41–43). This contention again seeks to equate this to a criminal proceeding. Yet at the same time petitioner concedes that dismissal can be based upon any reason which the respondent, in his "unrestricted judgment", seems to be necessary for the Army's best interests (A. Br. 25). Since neither the concededly valid dismissal, the accompanying discharge, or the notation thereon, have caused petitioner legal injury, the precision of the criteria is immaterial. But, in any event, the criteria challenged by petitioner refer only to types of acts and associations which "warrant consideration of action to effect" a determination that a soldier's retention is not consistent with security, and are merely guideposts to administrative action. Considering the multitude of factors which may properly be taken into account in making the ultimate determination, these guideposts are as specific as could reasonably be expected. Hence, even if the constitutional doctrine of vagueness had any application to this type of administrative instruction, the requirements of that doctrine would be met. *Lichter* v. *United States*, 334 U. S. 742; *American Power Co.* v. *S. E. C.*, 329 U. S. 90, 104; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126; *Yakus* v. *United States*, 321 U. S. 414, 423–424; *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 574; *Hampton & Co.* v. *United States*, 276 U. S. 394.

Both petitioners have been accorded hearings and extensive administrative consideration of their claims respecting the character of their discharges (see *supra*, pp. 6–10, 12–14). They do not complain of any violation of the procedures required by statute or regulation. These procedures are all that are required to validate the discharges given them. Cf. *Reaves* v. *Ainsworth*, 219 U. S. 296, 305.

3. *Petitioners' First Amendment rights have not been violated.* The argument is also made that the actions of the Secretary abridge petitioners' First Amendment right to freedom of speech (H. Br. 15–16, 45–48; A. Br. 25–26). Clearly, the discharges are not *prior* restraints, since petitioners are as free now to express their opinions and political views as they were before they were inducted into the Army. Nor are they, as we have seen, punishment of any kind, including punishment for the past exercise of First Amendment rights. The respective characters of the discharges are ancillary to the Secretary's valid and unchallenged determinations that the interests of national security required petitioners' separation. Petitioner Harmon (H. Br. 45) relies on the opinion of this Court in *American Communications Association* v. *Douds, supra,* for the proposition that First Amendment rights may not be violated by indirect restraints and punishment. But in upholding the validity of Section 9 (h) of the National Labor Relations Act, this Court stated (339 U. S. at 398, 402–403):

> * * * the right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court. * * *
>
> * * * * *
>
> * * * we have here no statute which is either frankly aimed at the suppression of dangerous ideas nor one which, although ostensibly aimed at the regulation of conduct, may actu-

ally "be made the instrument of arbitrary suppression of free expression of views".

That is equally true here. See also, *e. g., United Public Workers* v. *Mitchell,* 330 U. S. 75; *Garner* v. *Board of Public Works of Los Angeles,* 341 U. S. 716; *Adler* v. *Board of Education,* 342 U. S. 485; *United States* v. *Harriss,* 347 U. S. 612, 625–626; *Teamsters Union* v. *Vogt, Inc.,* 354 U. S. 284. There is no violation of the First Amendment.

CONCLUSION

For the foregoing reasons, it is submitted that the judgments below should be affirmed.

Respectfully submitted.

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Solicitor General.
GEORGE COCHRAN DOUB,
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Col., JAGC, U. S. Army,
Office of the Judge Advocate General,
Department of the Army.

NOVEMBER 1957.

APPENDIX A

1. The pertinent constitutional provisions are as follows:

Article I:

SECTION 8. The Congress shall have the Power * * *

* * * * *

To raise and support Armies, * * *

* * * * *

To make Rules for the Government and Regulation of the land and naval Forces;

* * * * *

SECTION 9. * * * No Bill of Attainder or ex post facto Law shall be passed.

* * * * *

Article II:

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States * * *.

* * * * *

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment:

No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

2. Section 1 of Chapter II of the Act of June 4, 1920, 41 Stat. 809, as amended, 10 U. S. C. 652a provides as follows:

> No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial.

3. Section 4 (b) of the Universal Military Training and Service Act, 62 Stat. 606, as amended, 50 U. S. C. App. 454 (b), provides as follows:

> Each person inducted into the Armed Forces under the provisions of subsection (a) of this section shall serve on active training and service for a period of twenty-four consecutive months, unless sooner released, transferred, or discharged in accordance with procedures prescribed by the Secretary of Defense (or the Secretary of the Treasury with respect to the United States Coast Guard) or as otherwise prescribed by subsection (d) of section 4 of this title [subsection (d) of this section].

4. The Armed Forces Reserve Act of 1952, 66 Stat. 481, Sections 248 and 249, 50 U. S. C. 991, 992, provide in pertinent part as follows:

> SECTION 248. Subject to the provisions of this Act, the discharge of commissioned officers of the reserve components shall be effected at the pleasure of the President, and the discharge of other members of the reserve components shall be in accordance with regulations promulgated by the appropriate Secretary.
>
> SECTION 249. (a) * * *
>
> (b) The President or the appropriate Secretary may drop from the rolls any member of the reserve components who has been absent without authority from his place of duty for a period of three months or more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a Federal or State penitentiary or correctional institution.
>
> (c) A member of a reserve component discharged or separated for cause other than as specified in subsection (b) of this section shall be given a discharge under honorable conditions unless—
>
> > (1) a discharge under conditions other than honorable is effected pursuant to the approved sentence of a court-martial or the approved findings of a board of officers convened by competent authority, or
> >
> > (2) the member consents to a discharge under conditions other than honorable with waiver of court-martial or board proceedings.

5. Section 301 of the Servicemen's Readjustment Act of June 22, 1944, c. 268, 58 Stat. 286, as amended, 38 U. S. C. 693h, provides in pertinent part as follows:

> The Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Navy,

after conference with the Administrator of Veterans' Affairs, are authorized and directed to establish in the Army, Air Force and Navy Departments, respectively, boards of review composed of five members each, whose duties shall be to review, on their own motion or upon the request of a former officer or enlisted man * * * the type and nature of his discharge or dismissal, except a discharge or dismissal by reason of the sentence of a general court martial. Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person. Witnesses shall be permitted to present testimony either in person or by affidavit and the person requesting review shall be allowed to appear before such board in person or by counsel * * *. Such board shall have authority, except in the case of a discharge or dismissal by reason of the sentence of a general court martial, to change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board. The Articles of War and the Articles for the Government of the Navy are amended to authorize the Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Navy to establish such boards of review, the findings thereof to be final subject only to review by the Secretary of the Army, the Secretary of the Air Force, or the Secretary of the Navy, respectively * * *.

6. Section 207 of the Legislative Reorganization Act of August 2, 1946, 60 Stat. 837, as amended, 5 U. S. C. 191a, provides in pertinent part as follows:

The Secretaries of the Army, Navy, and Air Force, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Depart-

ments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and corrections so made shall be final and conclusive on all officers of the Government except when procured by means of fraud * * *.

7. Section 5 of the National Security Act Amendments of 1949, 63 Stat. 580, as amended, 5 U. S. C. 171a (c) (4), provides as follows:

> The Departments of the Army, Navy, and Air Force shall be separately administered by their respective Secretaries under the direction, authority, and control of the Secretary of Defense.

APPENDIX B

VETERANS ADMINISTRATION

OFFICE OF GENERAL COUNSEL

Washington 25, D. C., June 22, 1956.

MR. GEORGE COCHRAN DOUB,
Assistant Attorney General,
Civil Division, Department of Justice,
Washington 25, D. C.

DEAR MR. DOUB: This is in response to your letter of May 29, 1956, respecting the case of *Howard D. Abramowitz* vs. *Wilber M. Brucker,* D. C. Civil Action No. 2140–56.

In your letter you say:

> This office is presently representing the Secretary of the Army who is defendant in the above captioned action by a former soldier discharged from the enlisted reserve as a security risk with an Undesirable Discharge Certificate. Plaintiff seeks an Honorable Discharge Certificate. The plaintiff * * * alleges that he was separated from active duty after twenty months of service with a certificate of honorable separation. He also alleges that, as a result of his discharge with an Undesirable Discharge Certificate from the enlisted reserve, he "has been and will continue to be deprived of substantial monetary benefits and rights as a veteran under both federal and state legislation. * * *"

On the foregoing facts you then ask the following questions:

> (1) Has plaintiff ever been denied veterans' benefits by the Veterans Administration; and

> (2) Does plaintiff's discharge from the enlisted reserve as an undesirable security risk vitiate the eligibility for veterans' benefits he would otherwise enjoy as a result of his separation from active service under honorable conditions.

This office has obtained the file of Mr. Abramowitz from the Veterans Administration Regional Office, Brooklyn, New York. It shows that Mr. Abramowitz served honorably during the Korean Conflict. Thereafter, he made application to the Veterans Administration for the following benefits: compensation, dental treatment, and education and training allowance.

Medical and clinical records of the veteran were obtained from the Department of the Army, and these records were considered in adjudication of his applications for compensation and for dental treatment. As to the compensation, the veteran in a letter of May 19, 1954, was informed as follows:

> Service connection has been established for your defective hearing condition, but not to a compensable degree; eye condition claimed by you is not shown by the evidence of record; headaches condition, rating is deferred pending receipt of additional evidence requested from you.

The veteran requested and was granted further time to submit evidence on the last-mentioned possible disability, but it has not been supplied, and the claim has now lapsed.

As to the application for dental treatment, the veteran was examined on September 25, 1953, and his dental condition was found to be service-connected in part. He was rated entitled to treatment for this part.

The other application of the veteran was for education and training under Title II of Public Law 550,

82d Congress, 38 USCA 911–966. This application was approved.

With regard to your second question, respecting the result of the discharge from the enlisted reserves as an undesirable security risk, it may be stated as a general rule that the matter of entitlement or nonentitlement to benefits administered by the Veterans Administration is ordinarily governed by the character of discharge from an active duty status, and status, lack of status, or termination of status in the reserves is not pertinent, in the absence of related active duty or authorized training duty of the reservist.

The character of service requisite to entitlement to veterans' benefits is established by statute. Section 300 of Title I, Public Law 346, 78th Congress, 38 USCA 693g, provides:

> The discharge or dismissal by reason of the sentence of a general court martial of any person from the military or naval forces, or the discharge of any such person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, or as a deserter, or of an officer by the acceptance of his resignation for the good of the service, shall bar all rights of such person, based upon the period of service from which he is so discharged or dismissed, under any laws administered by the Veterans' Administration: Provided, That in the case of any such person, if it be established to the satisfaction of the Administrator that at the time of the commission of the offense such person was insane he shall not be precluded from benefits to which he is otherwise entitled under the laws administered by the Veterans' Administration: And provided further, That this section shall

not apply to any war risk Government (converted) or national service life-insurance policy.

Section 1503 of Title VI of the same Act, 38 USCA 697c, is as follows:

> A discharge or release from active service under conditions other than dishonorable shall be a prerequisite to entitlement to veterans' benefits provided by this Act or Public Law Numbered 2, Seventy-third Congress, as amended.

The foregoing statutory provisions were considered in Administrator's Decision No. 655, June 20, 1945. In that case, the veteran was honorably discharged from the Navy on September 27, 1942. He had a second period of service, June 11, 1943 to September 1, 1944, from which he was dishonorably discharged. The question presented was whether the veteran was entitled to education and training under Title II of Public Law No. 346. (Part VIII of Veterans Regulation No. 1 (a), 38 USCA Ch 12A).

In the decision, it was pointed out that section 300, which barred rights of a person discharged under the conditions set forth, made the bar apply only to benefits or rights "based upon the period of service from which he is so discharged or dismissed." It was then said, inter alia:

> This language clearly implies that such a discharge or dismissal from one period of service shall not operate as a bar where the claim is based on another period of service which meets the requirements of the particular benefit claimed * * *. A similar provision limiting the bar to all rights based on the particular period of service from which the person is discharged or released under dishonorable conditions does not appear in the language either of section 700 (a) or of section 1503. The sections in

> question all appear in the same Act and obviously must be read together. Especially must this be so since section 300 by its specific terms refers to all laws administered by the Veterans' Administration. Further, it is unreasonable to believe that Congress intended to limit the effect of a dishonorable discharge for one of the grave offenses mentioned in section 300 to the period of service from which it was received and to permit a dishonorable discharge for a lesser offense to constitute a bar to rights for all periods of service.

It was held accordingly with respect to the benefit claimed that the dishonorable character of the last discharge did not vitiate the entitlement of the veteran predicated on his prior honorable service. Although the conclusion was given in terms of the particular benefit involved, the proposition set forth is not limited to this one benefit.

As to the instant question, there has been only one period of active service, and that was under honorable conditions. If there had been a subsequent period of active service, and if further such subsequent service were terminated by a dishonorable discharge on the ground that the person concerned was an undesirable security risk, there would nevertheless remain the entitlement of the veteran to veterans' benefits in view of his prior honorable discharge.

There is another statute which bears on the matter of disentitlement, though not from the aspect of character of service. Section 4 of Public Law 144, 78th Congress, 38 USCA 728, is as follows:

> Any person shown by evidence satisfactory to the Administrator of Veterans' Affairs to be guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies shall forfeit all accrued or future benefits under laws administered by the

> Veterans' Administration pertaining to gratuities for veterans and their dependents: Provided, however, That the Administrator of Veterans' Affairs, in his discretion, may apportion and pay any part of such benefits to the dependents of such person not exceeding the amount to which each dependent would be entitled if such person were dead.

Your letter does not state the reason why the veteran was regarded as a security risk. It will be assumed for purpose of the question that the discharge is connected with possible Communist affiliation or activity. Such connection with Communism would not be mutiny, treason or sabotage, but it might seem to indicate the last-named offense, viz: rendering assistance to an enemy of the United States or of its allies.

It has been held, however, that the quoted section does not establish a loyalty test or standard with respect to veterans' benefits, nor does it discriminate between veterans on the ground of political belief. Ops Sol 513–47, 127–49. Further, being a Communist does not constitute guilt of the particular offense in the absence of affirmative evidence of an overt act or of a court conviction, as under the Smith Act, 18 USCA 2385, relating to activities during hostilities. Op GC 16–54. Hence being a security risk because of connection with Communism would likewise not constitute guilt or presumption of guilt. Since the end of hostilities in Korea, moreover, there is no longer an "enemy" as the word is used in section 4, Public Law 144. Op Sol 8–52.

In summary, the discharge of the veteran from the reserves as a security risk has not resulted in the denial to him of benefits administered by this Agency, arising from his prior honorable discharge from the

active service. Nor does his discharge from the reserves, standing alone, vitiate any entitlement to benefits under present legislation.

Very truly yours,

GUY H. BIRDSALL,
General Counsel.

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Supplemental Memorandum for the Respondent

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 80

JOHN HENRY HARMON III, PETITIONER

v.

WILBER M. BRUCKER, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF THE ARMY

No. 141

HOWARD D. ABRAMOWITZ, PETITIONER

v.

WILBER M. BRUCKER

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

This Supplemental Memorandum is submitted by the respondent, pursuant to Rule 41 (5) of the Revised Rules of this Court, in order to discuss new material, incorporated by reference into petitioner Harmon's Reply Brief (Br. 9, note 13a), from an article by William K. Jones entitled *Jurisdiction of the Federal Courts to Review the Character of Mili-*

tary Administrative Discharges, which was published in the November 1957 issue of the Columbia Law Review (Vol. 57, No. 7, pp. 917–974), subsequent to the filing of the Brief for the Respondent in these cases. The matter referred to (*id.* at 966–971) deals with the legislative history of Section 207 of the Legislative Reorganization Act of 1946 (60 Stat. 837, 5 U. S. C. 191a[1]), and more particularly with the amendment to that section enacted by the Act of October 25, 1951, 65 Stat. 655, 656.

The thesis propounded by Mr. Jones and adopted by petitioner Harmon is summarized as follows at pp. 8–9 of his Reply Brief:

> * * * the finality provision of Section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 837, 5 U. S. C. 191a "actually was enacted with the intention that * * * decisions of the [Army Board for the Correction of Military Records] adverse to the veteran should be subject to the fullest judicial review" and * * * Congress, fully aware that 15,000 ex-servicemen were then seeking correction of their military records, intended that "the courts of the United States should not be precluded from reviewing such cases under appropriate circumstances".

In his article, Jones relies primarily upon the legislative history of the 1951 amendment to support these conclusions.[2] We submit that his conclusions are

---

[1] Now 10 U. S. C. 1552; see Brief for Respondent, p. 3, note 2.

[2] The significant legislative history of the 1951 amendment is found, chronologically, in the following: V *Hearings Before the House Committee on Armed Services* [*No. 212*], *Subcommittee Hearing on H. R. 6813, To Amend Section 207 of the Legislative Reorganization Act of 1946 so as to Authorize*

diametrically opposed to those indicated by a thorough analysis of the material upon which he relies.

1. As we have pointed out in our Main Brief at pp. 35–42, Congress originally enacted Section 207, in 1946, in order to provide an administrative substitute for the enactment of private bills for the correction of military or naval records, including military discharges. The legislative history of the original enactment demonstrates that Congress wished to relieve itself of the burdens of considering claims which were theretofore cognizable in no forum other than Congress itself.[3] This fundamental point was repeatedly

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Payment of Claims Arising from the Correction of Military or Naval Records, 81st Cong., 2d Sess. (June 13, 1950), pp. 7239–7245 ("*Subcommittee Hearings* [*212*]" hereafter); I *Hearings Before the House Committee on Armed Services* [*No. 19*], *Subcommittee Hearings on H. R. 1181* [*etc.*], 82nd Cong., 1st Sess., pp. 353–372 (May 3, 1951), 372–400 (May 7, 1951), and 400–403 (May 10, 1951; executive session) ("*Subcommittee Hearings* [*No. 19*]" hereafter); I *Hearings Before the House Committee on Armed Services* [*No. 21*], *Full Committee Hearing on* * * * *H. R. 1181* * * *, 82nd Cong., 1st Sess., pp. 445–450 (May 15, 1951) ("*Full Committee Hearings* [*No. 21*]" hereafter); H. Rept, No. 449, 82nd Cong., 1st Sess. (May 15, 1951); I *Hearings Before the House Committee on Armed Services* [*No. 27*], *Full Committee Hearings on* * * * *H. R. 1181* * * *, 82nd Cong., 1st Sess., pp. 600–602 (June 5, 1951) ("*Full Committee Hearings* [*No. 27*]" hereafter); 97 Cong. Rec. 7588–7589 (July 2, 1951); IV *Hearings Before the Senate Committee on Armed Services, Subcommittee Hearing on H. R. 1181*, 82nd Cong., 1st Sess. (September 17, 1951) ("*Senate Subcommittee Hearings*" hereafter); Sen. Rept. No. 788, 82nd Cong., 1st Sess. (September 20, 1951); 97 Cong. Rec. 12409 (October 1, 1951); Sen. Rept. No. 923, 82nd Cong., 1st Sess. (October 8, 1951); 97 Cong. Rec. 12964–12966 (October 11, 1951).

[3] See Main Br. 35–42. The committee reports preceding the enactment of the Legislative Reorganization Act of 1946, although issued prior to the inclusion of the provision for boards

emphasized when the proposal to amend Section 207 was considered in 1951.[4] As enacted in 1946, the statute read as follows (60 Stat. 837):

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for the correction of military records in any bill, are illuminating in considering whether Congress later intended that such administrative corrections be final and non-reviewable. These reports state in pertinent part (emphasis added):

2. DELEGATION OF PRIVATE CLAIMS

Recommendations: That Congress delegate authority to the Federal courts and to the Court of Claims to hear and settle claims against the Federal Government; and that *Government agencies and departments* be empowered to handle local and private matters now provided for in private bills, such as private pension bills and legislation authorizing construction of bridges over navigable streams.

* * * * *

The United States courts are well able and equipped to hear these [private] claims [against the Government] and to decide them with justice and equity both to the Government and to the claimants. We, therefore, recommend that all claims for damages against the Government be transferred by law to the United States Court of Claims and to the United States district courts for proper adjudication.

We further recommend that private pension bills and other bills dealing with *purely local and private matters*, including the authority to construct bridges over navigable streams, be delegated to the *proper agencies of government for final determination.*

Report of the Joint Committee on the Organization of Congress, Sen. Rept. No. 1011, H. Rept. No. 1675, 79th Cong., 2d Sess., p. 25.

[4] See, *e. g.*, *Subcommittee Hearings* [No. 19] at 367:

* * * [T]his function which the Department now performs under section 207 is a function which the Congress itself performed throughout the history of this country up until the time section 207 was passed. In other words, nobody got a record corrected, nobody got paid under the circumstances of these cases, unless and until there was a private

> SEC. 207. The Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or to remove an injustice.

It was apparently thought at the time of enactment that this language conferred sufficient authority upon

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relief bill passed for that particular case, prior to August 1, 1946, when these boards were set up.

See also *id.* at 369, 370, 371, 374, 376, 378; *Full Committee Hearings* [*No. 21*] at 448; 97 Cong. Rec. 7588–7589. Senate Report No. 788, 82nd Cong., 1st Sess., notes, at p. 1, that "[p]rior to 1946, corrections in military and naval records could be made only when authorized by a private bill enacted by the Congress."

Jones ignores this important factor completely in his discussion of whether military discharges were subject to judicial review prior to the enactment of Section 207. It is apparently the failure to appreciate the significance of the congressional assumption of jurisdiction in this field which causes him to assert that the history of the "general policy of immunity of military discharges from judicial review" may not be relied upon in interpreting congressional intent in enacting Section 207 and the 1951 amendment thereto because there has been no showing that "the legal development * * * was ever specifically communicated to Congress" (57 Col. L. Rev. at 965, note 192). No such "communication" was, of course, necessary, since the "general policy" was that of Congress itself, manifested in the enactment of private relief acts. This failure is also apparently responsible for the ease with which Jones infers a congressional intent to accord judicial review in a previously non-reviewable area from the generalized and inconclusive language of two Congressmen at the subcommittee hearings quoted at 57 Col. L. Rev. at 968. See also *infra*, pp. 8 *ff*, 14–16.

the Secretaries, acting through the correction boards, to provide the identical measure of relief that Congress had previously provided through private relief acts. See 41 Op. A. G. No. 1. In 1948, however, the Comptroller General ruled that the statute empowered the Secretaries only to correct the record itself, and did not empower the agencies concerned to take the further step of making payments of monies to which the claimant might become entitled, as a matter of law, as a result of the correction. See 27 Comp. Gen. 665; 27 Comp. Gen. 709.

When this ruling was called to the attention of Congress, bills were introduced to amend Section 207 so as to authorize such administrative payments, in order to complete the transfer of congressional functions in this area to the Secretaries, acting in their discretion through the correction boards.[5] The bill which went through hearings to final enactment[6]

[5] The problem which these bills, resulting in the 1951 amendment, were thus intended to remedy is of course not involved in the present cases, since petitioners Harmon and Abramowitz would not be entitled to any payments beyond those already made, even if their discharges were upgraded to Honorable. See Main Br. 59–60.

We are informed by the Department of the Army that petitioner Harmon has been paid the monies to which he became entitled when his discharge was upgraded from Undesirable to General. We are further informed, contrary to Harmon's repeated assertions that he has never in fact received the proffered General Discharge certificate and accompanying DD Form 214, that the Department of the Army sent these documents, in the form set forth at H. R. 111–112, to Harmon, by letter dated February 15, 1957, registered receipt number 1160429.

[6] Originally H. R. 6813, 81st Cong., 2d Sess., printed in *Subcommittee Hearings* [*No. 212*], pp. 7239–7240; subsequently renumbered H. R. 1181, 82nd Cong., 1st Sess.

would have reenacted the original authorization to correct records as subsection (a), and added three new subsections. Subsection (b) would have authorized the Secretary concerned or his designee "to settle and pay * * * claims * * * of amounts * * * found to be due * * * as a result of" such corrections. Subsection (c) provided as follows:

> (c) The acceptance by the claimant of any settlement made pursuant to subsection (b) of this section shall constitute a complete release by the claimant of any claim against the United States on account of such correction of record and such settlement shall be final and conclusive on all officers of the Government including review by the courts of the United States, except when procured by means of fraud.

Three features of the bill are noteworthy for present purposes. First, the Secretaries were to perform two distinct functions: decide claims on their merits, as before, under subsection (a), and "settle and pay" claims resulting from corrections, under subsection (b). Second, under subsection (c), the claimant's acceptance of the *settlement* (the second of the Secretaries' functions), arrived at pursuant to the subsection (b), was to constitute a release of any claims based upon the record as corrected. Finally, the *settlement* under subsection (b) was to be "final and conclusive on all officers of the Government" and not subject to judicial review, in the absence of fraud. See *Subcommittee Hearings* [*No. 212*], p. 7243. Subsection (a) thus dealt exclusively with determinations on the merits as to whether or not the record should be corrected—with which we are concerned in the present

cases—while subsections (b) and (c) dealt exclusively with money settlements based upon records which had been corrected.

2. The thrust of Jones' contentions, in his article in the Columbia Law Review, is that, when Congress rejected the amendatory wording "including review by the courts of the United States" and stated through the Committee that "under appropriate circumstances" judicial review should be permitted,[7] Congress intended that the Secretary's actions on applications for correction of military records be subject to review by the courts. That this contention is without merit seems to us plain. As we have just pointed out (*supra*, p. 7), the amendatory language—"shall be final and conclusive * * * including review by the courts * * *"—was introduced with reference only to subsection (b), the money settlement section, and not with reference to subsection (a), which grants unrestricted power to the Secretaries to make corrections where in their judgment such action will remedy injustice or error. Moreover, the legislative history, read as a whole, demonstrates that the true significance of Congress' failure to adopt the nonreviewability provision was simply to protect the jurisdiction and functions of the General Accounting Office and the Court of Claims in interpreting and applying *money* statutes.

The chief problem which the committees faced in considering the proposed amendment arose from the General Accounting Office's objection that the pro-

[7] See *Full Committee Hearing* [*No. 21*], p. 450; H. Rept. No. 449, 82nd Cong., 1st Sess., p. 3.

posal to make money settlements by the correction boards final and conclusive on all officers of the Government, including review by the courts, constituted an unwarranted interference with the jurisdiction of the Comptroller General. Mr. John T. Burns, of the Office of the General Counsel of the General Accounting Office, defined the problem for the subcommittee as follows (*Subcommittee Hearings* [*No. 19*]; emphasis added):

> Of course there are really two different things here, and I think it is well to keep that in mind. One thing is the determination, the correction of the record; and the other thing is the settlement based on that correction. *Subsection (a) would give the head of the Department the authority to make the correction. We do not want to challenge that authority. We do not want to say it is not final and conclusive, with or without this language in subsection (c).* [P. 377.]
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> * * * * *
>
> In other words, we are not going to question their determination, even in the case of the man who was given 2 years' additional longevity so that those 2 years add to his pay for the rest of his life. We would not question their authority to make such a correction.
>
> * * * * *
>
> * * * But we think that this [amendatory finality] language would take away our authority to *pass on the computation of the payment,* for example. [P. 369.]
>
> * * * * *

> Mr. DOYLE. * * * Then if you do not want to question their authority and jurisdiction to correct the record, what is it you wish to question?
>
> Mr. BURNS. Question their authority to settle and pay out of applicable current appropriations claims of any persons, *based on those corrections*. [P. 377.]
>
> * * * * * * *
>
> * * * If the clerks in the General Accounting Office made a mathematical error or if the clerks in the Department of Defense made such error we would not want the settlement based thereon to be conclusive on the Government. We would not have anything to do with any conclusions of fact as such. [P. 378.]

The Department of Defense, on the other hand, expressed its concern that, if the finality provision were stricken from the bill, the General Accounting Office, despite its disclaimers, might invade the jurisdiction of the Secretaries to determine claims for corrections on their merits instead of restricting itself to its auditing function. See *Subcommittee Hearings* [*No. 19*], pp. 362–363, 386–392. The departmental representatives stressed the "plenary powers in these boards to decide on the merits" (*id.* at 362, 363), and the fact that the discretionary nature of the determinations on the merits made them inappropriate for review outside the Service Departments (*id.* at 389).

The House committee resolved this inter-agency conflict to the satisfaction of all concerned by the simple expedient of striking the nonreviewability clause (*Full Committee Hearings* [*No. 21*], p. 450; *Full*

Committee Hearings [*No. 27*], pp. 601–602) and transferring the finality language from subsection (c) to subsection (a), thereby making the finality clause applicable to the Secretaries' determinations on the merits. As the subcommittee spokesman explained: "Now, before, that pertained to the payment and not to the correction. I think it is a good amendment" (*id.* at 601).

The effect of these changes in the original bill was clearly delineated in a colloquy between Representative Vinson, the Chairman of the full Committee, and Representative Smart, the spokesman for the subcommittee, when the bill again came under discussion in the full Committee after the issuance of the committee report.[8] In our view, the following discussion makes it plain that Congress intended that the authority of the Secretary to grant or deny an application for correction remained final and conclusive, without any review power in the courts or elsewhere[9] (*id.* at 600–601; emphasis added):

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[8] Jones makes no reference to this hearing session. Since it took place after the bill was reported, it is possible that he overlooked it.

[9] This colloquy has been called to the Court's attention in the Government's Petition for a Writ of Certiorari to the United States Court of Claims in *United States* v. *Thomas L. Suter*, No. 620, this Term, at p. 13, note 18. That petition outlines at length the many considerations underlying the Government's position that correction board determinations on the merits are not, and were not intended to be, subject to review by the courts. It further points out that the Government has heretofore not been in a position to seek review in this Court of the assumption by the Court of Claims of jurisdiction to review correction board decisions, as asserted in the cases relied upon by Jones at 57 Col. L. Rev. at 970–971.

Mr. SMART. Mr. Chairman, may I first make this brief observation. *When the bill was reported by the subcommittee it was the intention of the committee that the jurisdiction over cases to correct military records and the determination of the cases on their merits be exclusive and final in the Board which made such corrections but that the normal auditing authority of the Comptroller be not disturbed.*

The committee was of the opinion, and we had witnesses here from the Comptroller General's Office, that it had accomplished that. Subsequent to the reporting of the bill by the committee, on the 25th of May, the Comptroller General directed a letter to Mr. Vinson, the chairman, stating he did not feel that the committee had accomplished its purpose and suggested certain technical amendments to go in the bill, three in number, which he felt would accomplish that purpose.

I immediately submitted those amendments to the Defense Department for their consideration and I have back a letter today from the Office of the Assistant Secretary of Defense dated June 4, wherein they accept the amendments and interpose no objection to them.

The CHAIRMAN. *Now, does it go into the question of the finding on the merit by the Department? That is final and conclusive?*

Mr. SMART. *That is correct sir.*

The CHAIRMAN. That is right. *We want to keep it that way.* But it merely gives the Comptroller the authority to audit what?

Mr. SMART. Audit the payment.

The CHAIRMAN. Audit the payment.

Mr. SMART. *So the determination of the*

merits as to whether or not a record should be corrected is final and conclusive by the Board.

The CHAIRMAN. *That is right.*

The foregoing legislative history clearly defines the "appropriate circumstances" (the term the full committee used) which Congress envisaged for judicial review, *i. e.*, purely and simply the question of the determination and computation of the *amounts* due as a result of a correction made by the Secretary. In such circumstances, the Act as finally passed reserved this limited review power to both the General Accounting Office and the courts.[10] Plainly, removing the

[10] As amended by the 1951 enactment, the statute read as follows, in pertinent part (65 Stat. 655, 656):

SEC. 207. (a) The Secretaries of the Army, Navy, and Air Force and the Secretary of the Treasury (with respect to the Coast Guard), respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and corrections so made shall be final and conclusive on all officers of the Government except when procured by means of fraud * * *.

(b) The Department concerned is authorized to pay, out of applicable current appropriations, claims of any persons, their heirs at law or legal representatives as hereinafter provided, of amounts paid as fines, forfeitures, or for losses of pay (including retired or retirement pay), allowances, compensation, emoluments, or other monetary benefits, as the case may be, which are found to be due on account of military or naval service as a result of the action heretofore taken pursuant to section 207 of the Legislative Reorganization Act of 1946, or hereafter taken pursuant to subsection (a) of this section * * *.

(c) The acceptance by the claimant of any settlement made pursuant to subsection (b) of this section shall con-

proposed bar to review of *money settlements* by the courts and permitting review "under appropriate circumstances" had no relation to situations, such as those here, where no correction is made by the Secretary and, on the contrary, he declines to alter the record. However, once the Secretary has effected a correction which by its nature would entitle the applicant to recover money from the United States, under the statute as amended he cannot deny the applicant the moneys to which his entitlement under the law has been established by the Secretary.[11] These are the "appropriate circumstances" for review, traditional in the Court of Claims, to which the legislative history of the amendment had reference.

3. In support of his far broader interpretation of the action of Congress in striking the nonreviewability clause, Jones relies almost exclusively upon a colloquy which took place in the subcommittee hearing and involved two Congressmen (57 Col. L. Rev. at 968, quoting from *Subcommittee Hearings* [*No. 19*], pp. 391–393). Concededly, some of that language of the two Congressmen is susceptible to a broad reading. But, insofar as this is true, the discussion cited was not germane to the question then under discussion—whether the nonreviewability clause of subsection (c), relating solely to money settlements, should be retained or stricken. Moreover, if it was the intention

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stitute a complete release by the claimant of any claim against the United States on account of such correction of record.

[11] The Comptroller General has so interpreted the 1951 amendment. 33 Comp. Gen. 1; 34 Comp. Gen. 7.

of these two members of the subcommittee to take the relatively significant step of subjecting to judicial review, for the first time, the Secretaries' determinations *on the merits* of all applications for the correction of records, this intention was communicated neither to the full committee, to the House, nor to the Senate. Nor did Representative Smart, the spokesman for the subcommittee, indicate that he had any such view; and the same is true of Representative Vinson, the chairman of the full committee. See *supra,* pp. 11–13. As we have noted, *supra,* p. 8, both the full committee and the House, through the committee report, were apprised only that the nonreviewability-of-settlements clause had been stricken to provide court review "under appropriate circumstances". In explaining the bill on the floor of the House, Chairman Vinson did not even hint that the bill, if enacted, would permit general judicial review of correction board decisions. To the contrary, he informed the House that "in amending section 207 of the Legislative Reorganization Act, we have provided that the respective boards for the correction of military or naval records shall rule upon questions of jurisdiction over claims and the merits of such claim, and that such ruling will be final and conclusive on all officers of the Government, except when procured by means of fraud" (97 Cong. Rec. 7589).

In the Senate hearings, there was again no discussion of judicial review, the subcommittee being informed instead that the bill as passed by the House "provides that corrections made are final and conclu-

sive except where procured by fraud" (*Senate Subcommittee Hearings,* p. 9). The resulting Senate committee report similarly contained no mention of the role of the courts, or of the House action in striking the proposed nonreview clause, stating simply that "[c]orrections made by the boards are conclusive on all officers of the Government except when procured by means of fraud" (Sen. Rept. No. 788, 82nd Cong., 1st Sess., p. 2). And the Senate debates (97 Cong. Rec. 12409, 12964–12966), as well as a second Senate committee report (Sen. Rept. No. 923, 82nd Cong., 1st Sess.), are likewise devoid of references to court review, much less of statements that full judicial review of the merits of a determination was intended. Instead, they make it clear that the bill related solely to persons who had succeeded in having their records corrected but who had theretofore been unable to obtain payments based upon the corrections (Sen. Rept. 788, 82nd Cong., 1st Sess., pp. 1–2; 97 Cong. Rec. 12409, 12964–12965).

In these circumstances, the action of both houses of Congress in enacting the 1951 amendment, without the proposed limitation on judicial review of settlements, must be interpreted only as intended to permit judicial review of money "settlements" under the "appropriate circumstances" which we have outlined *supra* at pp. 8 *ff*, 13–14. The limited review thus permitted does not extend to the circumstances of these cases, where the respondent in his discretion has declined to alter the petitioners' records in the manner requested, and there have accordingly been no settlements.

Respectfully submitted,

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Supplemental Memo for the Respondent After Argument

No
80
14

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 80

JOHN HENRY HARMON III, PETITIONER

v.

WILBER M. BRUCKER, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF THE ARMY

No. 141

HOWARD D. ABRAMOWITZ, PETITIONER

v.

WILBER M. BRUCKER

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT AFTER ARGUMENT

I

A. In accordance with the statement of counsel at the oral argument of these cases, the Government is submitting herewith copies of the following Army Regulations, Memoranda, and directives relating to the discharge or separation of enlisted personnel:—

(1) Army Regulations 615–360, entitled "Enlisted Personnel—Discharge—General Provisions", June 24, 1953, together with Changes No. 1, 2, 3, and 4 to those Regulations.[1]

(2) Army Regulations 604–10, entitled "Military Personnel Security Program", July 29, 1955, and Changes No. 1 and 2 to those Regulations.[2]

(3) The following memoranda relating to changes in Department of Defense Directive No. 5210.9[3] and the review of discharges issued under the Military Personnel Security Program:

(a) Department of the Army Memorandum dated October 17, 1955.

(b) Changes made in DOD Directive 5210.9 on 16 November 1955.

(c) Memorandum from the Secretary of Defense dated January 11, 1956.

(d) Memorandum from the Assistant Secretary of the Army dated March 1, 1956.

(e) Statement of policy relating to amendments to the Military Personnel Security Program dated March 1, 1956.

B. Petitioners have never claimed that any regulations or directives were violated in effecting their

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[1] Paragraphs 7 through 9 of these regulations, as originally issued, are printed at Pet. Br. 52–54 in No. 80. AR 615–360 is referred to or discussed at Pet. Br. 2, 11, 27, 31, 33, 37 and 48, in No. 80, and at pp. 32 and 60 of the Brief for the Respondent.

[2] These regulations, as originally issued, are printed in pertinent part at Pet. Br. 37–50 in No. 141.

[3] This Directive, as originally issued, together with the covering Memorandum of the Secretary of Defense, is printed at R. 32–45 in No. 80.

respective discharges (see our main brief, p. 34). The only challenge in both cases is to the validity, under the applicable statutes and the Constitution, of the admittedly-applicable regulatory provisions which required consideration of the gravity of derogatory information, including information relating to pre-induction activities, in determining the character of the discharges issued to petitioners. We shall nevertheless set out, for the Court's convenience, a summary of the regulations and directives which were in force on the date of Harmon's original Undesirable Discharge (June 2, 1954), Abramowitz's Undesirable Discharge (September 13, 1955), Harmon's General Discharge (Under Honorable Conditions) (June 6, 1956), and the rejection of Abramowitz's request for review by the Army Board for the Correction of Military Records (September 7, 1956).

1. Petitioner Harmon was given an Undesirable Discharge on June 2, 1954, pursuant to Department of Defense Directive No. 5210.9, *supra* (see R. 98–99 in No. 80), which had been issued on April 7, 1954. This Directive established the Military Personnel Security Program. Section VIII (F) (5) of the Directive (R. 43 in No. 80) required that the character of separations or discharges effected thereunder "be predicated upon the gravity of the reasonably substantiated information in derogation". This provision of Department of Defense Directive No. 5210.9, directed to all the Armed Services, effectively modified the existing provisions of Army Regulations 615–360, as amended (transmitted herewith, with changes), *supra,*

setting forth the general provisions relating to Army discharges. As the Court noted at the oral argument, paragraph 8 of these regulations (AR 615–360) required that persons with character and efficiency ratings such as petitioners' should be issued Honorable Discharges, "except as provided in these regulations and pertinent regulations listed in paragraph 13 * * *." At the time of Harmon's discharge, the actual terms of paragraph 13 permitted less-than-Honorable Discharges to soldiers discharged on grounds, *inter alia*, of loyalty or subversion, and made no explicit reference to security cases. Section VIII (F) (5) of Directive No. 5210.9 in effect provided, however, an additional exception to paragraph 8 to permit less-than-Honorable Discharges in security cases.[4] In any event, the initial discharge issued to Harmon is no longer in issue due to the subsequent changes in that discharge.

2. By the time Abramowitz was issued his Undesirable Discharge on September 13, 1955, the Department of the Army had formally implemented Department of Defense Directive No. 5210.9 by issuing Spe-

[4] Petitioner Harmon has never contested the ruling of the District Court that this Directive "modified existing regulations of the Armed Services so as to make the civilian security program for government employees apply to the military" (R. 100), or the similar holding of the Court of Appeals (R. 117). See petitioner's statement of the Questions Presented, Pet. Br. 2–4 in No. 80. Thus, we pointed out in our main brief at p. 34 that petitioner did not assert that his discharge was in violation of existing regulations (including Army Regulations 615–360), but only that the pertinent regulation (Directive No. 5210.9), which was concededly properly applied to Harmon's case, was itself invalid.

cial Regulations 600–220–1, entitled "Military Personnel Security Program", on June 18, 1954,[5] and had superseded these regulations with Army Regulations 604–10 ("Military Personnel Security Program", *supra*), issued July 29, 1955.[6] Paragraph 19 of AR 604–10 provided, with exceptions not here pertinent, that the character of a discharge issued under its provisions (as was Abramowitz's discharge) should "be predicated upon the gravity of the reasonably substantiated information in derogation".

3. On October 17, 1955, the Department of the Army issued a Memorandum, transmitted herewith, outlining a modified policy for the application of the existing provisions of AR 604–10. On November 16, 1955, Section VIII (F) (5) of Department of Defense Directive No. 5210.9 was amended (see attachment) to provide that the character of separations in security cases should "be predicated upon a careful consideration of all pertinent factors including the gravity of substantiated derogatory information and the character of the service performed". The Secre-

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[5] The issuance of SR 600–220–1 was followed by Changes No. 4 to AR 615–360, which superseded the reference in paragraph 13 thereof to the "disloyal or subversive" regulation (AR 615–370) with a reference to SR 600–220–1.

[6] As noted in the briefs of both the petitioner in No. 141 (at pp. 5 and 31) and the respondent (at p. 12, note 7), AR 604–10 is identical with SR 600–220–1 for present purposes. For this reason, and because SR 600–220–1 was not in effect at the time of any of the actions here in question, SR 600–220–1 is not being transmitted to the Court, but is available for transmittal together with any additional regulations the Court may wish to have.

tary of Defense issued a Memorandum on January 11, 1956, also transmitted herewith, interpreting this amendment as requiring that the discharge be predicated solely upon the character of service rendered (including post-induction subversive activities) in cases where the soldier had been thoroughly investigated prior to induction and had completed his term of service.[7] On March 1, 1956, Assistant Secretary of the Army Hugh M. Milton II directed that the Army Discharge Review Board conduct a review of all military personnel security cases which resulted in General or Undesirable Discharges between November 10, 1948 and November 16, 1955, in order to determine whether a change in the type of discharge might be warranted (see attachment). The review was to be conducted in the light of the changed regulations and policies just cited, as implemented by the statement of policy attached to the Assistant Secretary's Memorandum of March 1st. This review resulted in the upgrading of Harmon's discharge to General (Under Honorable Conditions) on June 6, 1956. It will be noted that, in cases such as Harmon's, the existing regulations and policies still permitted the consideration of pre-induction activities in determining the character of discharge, although the character of his service was also to be considered

[7] Neither Harmon nor Abramowitz had been so investigated prior to induction; Harmon was discharged prior to the expiration of his term of active service and Abramowitz was discharged prior to the expiration of his Reserve service.

under the November 16, 1955 amendment to Department of Defense Directive No. 5210.9.

4. The Army Board for the Correction of Military Records rejected petitioner Abramowitz's request for review of his discharge on September 7, 1956 (see R. 21–22 in No. 141). Prior thereto, on June 12, 1956, Changes No. 2 to AR 604–10 had been issued. Section 19 (a) (3) of this amendment provided as follows:

> Members of the United States Army Reserve and National Guard of the United States not on active duty who are discharged prior to the completion of their term of service will be issued a discharge based on the gravity of the substantiated derogatory information (regarding matters occurring prior to and during their period of service) which requires their discharge and upon the character of service performed.

II

In addition to the foregoing materials requested by the Court, we are transmitting the following documents to which counsel referred in oral argument and which he stated would be lodged with the Clerk:

(1) Army Regulations 345–20, "Records—Release of Information and Records from Army Files", dated March 9, 1956. The Court's attention is particularly directed to the following sections: I (2) (a) (1); II (6) (a) (6); II (9) (a) (2), (10) and (12); III (13); IV (15) (e); and IV (17) (a) (3).

(2) Office Regulations, The Adjutant General's Office, Part Two, 13 June 1952, pp. 3, 30, implement-

ing Army Regulations 345–20, with respect to the release of information from Army records.

(3) Annual Report of Attorney General (N. Y.), 1920, page 184; 24 State Department Reports (N. Y.) 212, dated October 18, 1920, relating to the type of military discharge required for entitlement to the benefits provided by Section 32 of the General Business Law of New York, as amended.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JANUARY 1958.

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SUPREME COURT, U.S.

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 80

JOHN H. HARMON, III,

Appellant,

—against—

WILBUR M. BRUCKER, individually, and as Secretary of the Department of the Army,

Appellee.

BRIEF FOR *AMICUS CURIAE*

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BRIEF FOR *AMICUS CURIAE*

Interest of *Amicus Curiae*

The Workers Defense League is an unincorporated membership association organized in 1937 under the laws of the State of New York, with its principal office in New York City and members throughout the country. Its sole concern is in upholding the Constitution of the United States and in protecting the civil liberties of its people. It is not bound to any political party or creed and unpopular causes are defended by it solely because an adverse decision may at some future date adversely affect the civil and political rights, and the very lives, of all our people.

One of the principal areas of interest of the Workers Defense League has been the Military Personnel Security Program. More than 100 individual cases

have been represented by attorneys associated with it and the knowledge and experience gained thereby, and particularly through the efforts of Rowland Watts, its former Executive Director, has given to the Workers Defense League a unique insight into the problems arising out of this program.

This brief will focus directly on the experience, the expertise that the Workers Defense League has gained in this field and it is in this light that the Workers Defense League requests the permission of this Honorable Court to bring to its attention information, based upon its experience, concerning the consequences to young American men and women who have received less-than-honorable discharges under the Military Security System. We are not engaged in a philosophical debate. Receipt of a less-than-honorable discharge affects not only property rights, but the very existence of the individual.

The attorneys for the Appellant and the Solicitor General of the Department of Justice for the Appellee, have consented to the submission of this brief as *Amicus Curiae* by the Workers Defense League.

Statement

While other issues may be raised by either of the parties involved herein, it is only with the issue of civil liberties, particularly the denial of rights protected by the Bill of Rights that this brief concerns itself.

We direct ourselves to the question of whether Harmon suffered an injury by receiving a less-than-honorable discharge from the United States Army and

whether his constitutional rights were invaded in affecting that injury.

Facts of the Case

There is little dispute as to the facts in the present case. In February, 1954, while Harmon was actually on duty with the United States Army, he was required by the Adjutant General to reply in writing to a "Letter of Allegations" containing what was termed "derogatory information". Briefly, the information set forth was that (1) In 1951 and 1952, he was employed at Camp Lakeland; (2) In 1949, he was employed by the Detroit Urban League; (3) In 1952, he indicated in his political registration in New York City his vote for the American Labor Party; and (4) He solicited contributions for the defense of persons indicted under the Smith Act. The letter also contained information about the alleged "subversive" associations of Harmon's father and mother.

All the allegations pertained to Harmon's activities and associations as a civilian which by their very nature ceased prior to military service with the exception of (a) His continued relationship with his parents and (b) A letter which he wrote to two friends soliciting funds for Smith Act indictees.

Appellant replied to the allegation denying that he was then, or had ever been, a member of the Communist Party. In April 1955, the Adjutant General notified Appellant that he would be retained in the service and that upon the completion of his term of service, he would receive a discharge appropriate to the character of service.

Exactly two months later, without notice or hearing, the Adjutant General rescinded the prior order and separated the appellant from the United States Army with an "Undesirable" discharge certificate.

ARGUMENT

I. An individual who receives a less-than-honorable discharge from the military service suffers a substantial and continuing material injury.

Introduction

A young man about to embark upon his course in life, has few references to call upon to establish his character and reputation. Standing high on the list and widely recognized in our society today, is the character of his military service. The character of his service is measured by his discharge certificate. The character of a military discharge affects not only an individual's reputation in the eyes of a prospective employer, but qualifies the individual for many Federal and State benefits.

Harmon like his contemporaries, will suffer the loss of substantial public and private benefits due to a discharge certificate which is less-than-honorable. In some instances, the particular benefit will appear substantial on its face. In others, the benefit will seem less important. However, as to those benefits, it should be noted that the needs and interests of the claimant at the time of application will cast an entirely different light on their value.

Judge Edelstein speaking for the Court in *Bernstein v. Herren*, (U. S., D. C., S. D., N. Y.) 136 F. Supp. 493, stated:

> "An honorable discharge encompasses a property right as well as civil rights and personal honor."

The United States Army has indicated an appreciation of the far-reaching consequences of a discharge certificate:

> "Because the type of discharge may significantly influence the individual's civilian rights and eligibility for benefits provided by law, it is essential that all pertinent factors be considered so that the type of discharge will reflect accurately the nature of service rendered." *U. S. Army Reg.* No. 615-360, par. 7 (1953).

The value of a favorable discharge certificate for meritorious service is well recognized by American legal authorities. Robert T. Kimbrough in, "The American Law of Veterans" (1954), Sec. 149 (P. 105) states:

> "The kind of discharge received by a member of the armed forces is a matter of great importance. Not only will an unfavorable discharge stigmatize the recipient in his business life and social relations, but most of the benefits provided by law for veterans and their dependents are conditioned upon the receipt of a favorable discharge by the person on whose service the claim is based." At page 105.

While the enforcement of a constitutional right is not dependent on the total deprivation of that right,

we believe it will be of help to this Court to set forth the specific nature of the deprivation invoked by a less-than-honorable discharge under the circumstances described herein.

(A) Loss of Public Benefits

Under various Federal statutes, benefits are available to individuals who have received honorable discharges and in some few cases, to individuals who have received discharges which are not less-than-honorable.

A discharge under honorable conditions is required for a preference in government employment. (5 U. S. C. A. 851).

The facilities of the Soldier's Home are limited to applicants who have served "honorably". (24 U. S. C. A. 49). Membership in veterans' organizations such as The American Legion, The American Veterans and others, is conditioned by law on the showing of an honorable discharge. (36 U. S. C. A. 45).

Benefits available through the Veterans Administration are based upon the character of discharge from the service. (38 U. S. C. A. Chapter 12A). An honorable discharge is required under VA Regs. No. 1(A) for pensions, disability benefits, death benefits, vocational rehabilitation; under VA Regs. No. 7(A) for medical care; and under VA Regs. No. 9(A) payment for burial expenses.

The benefits set forth above under Federal law will be denied to Harmon. The less-than-honorable discharge which he received set him apart from other

former servicemen, resulting in a substantial loss of property otherwise available in the form of federal benefits.

In addition to the benefits available under Federal law, the various states have extensive benefits for honorable military service. A Report on Veterans Benefits of the United States by the President's Commission on Veterans Pensions, State Veterans Laws, Government Printing Office (1956), contains an exhaustive digest of state laws and related statistical data regarding rights, benefits and privileges of veterans. We will briefly set forth references to a cross section of state laws granting such benefits to servicemen who have received honorable discharges. Our research goes beyond the above report and identifies the specific benefits conditioned on the character of the discharge from military service.

OHIO, Title 59 of the Revised Code Annotated, Sec. 5901.25 confers burial rights when honorably discharged; Sec. 5903.03 directs the restoration to public employment when discharged under honorable conditions; Sec. 5903.06 requires the restoration to private employment when discharged under honorable conditions; Sec. 5905.02 conditions committment to a mental institution for servicemen on an honorable discharge as is required by the Veterans Administration; Sec. 5907.04 limits admissions to the Ohio Soldier's and Sailor's Home to honorably discharged veterans; and Sec. 5909.09 limits admission to the Soldier's and Sailor's Orphan's Home to the children of honorably discharged servicemen.

PENNSYLVANIA, Purdon's Statutes Annotated, Title 51, Military Affairs, Sec. 455.2 defines a veteran as one who has been discharged under honorable conditions.

WASHINGTON, Revised Code, Sec. 73.04.010, no fee for oath or certificate when the applicant has an honorable discharge; Sec. 73.04.050, no fee for peddler's license for an honorably discharged applicant; Sec. 73.04.060 exempts certain business from tax when conducted by honorably discharged veteran; Sec. 73.16.010 grants a preference in state employment to an honorably discharged veteran; Sec. 73.16.030 restores a veteran to private employment based on his honorable discharge; Sec. 173.24.010 extends burial payments to an honorably discharged veteran; Sec. 73.32.030 conditions the granting of the veterans bonus to an applicant of honorable service status; and Sec. 28.77.070 exempts an honorably discharged veteran from tuition fees at Washington University.

CALIFORNIA, West's Annotated California Code defines a veteran as one who has received an honorable discharge. Veterans are eligible for burial payments, Sec. 929; educational benefits, Sec. 981.1; relief assistance, Sec. 921; assistance in farm and home purchase, Sec. 801; and aid to dependents, Sec. 891.

MICHIGAN, Statutes Annotated, Sec. 4.1093(22) defines a veteran as one who served honorably, (d) "honorable and faithful service" shall be such service as is evidenced by an honorable discharge.

NEW YORK, McKinney's Consolidated Laws, Military Law, Sec. 122 defines a veteran as any enlistee or inductee in the military service of the United States

who receives a discharge other than "a dishonorable discharge, a discharge without honor, or a discharge for the good of the service." On this basis, a serviceman with less-than-honorable discharge would be denied a disability annuity. Social Welfare Law, Sec. 168-176 requires an honorable discharge for admission to Soldier's home, hospital, medical care, drugs, nursing care, financial assistance and burial payments. Preferences allowed veterans in appointment, promotions and restoration to employment under the Civil Service Law, Sec. 21-2 are limited to veterans who were honorably discharged or released under honorable circumstances. Tuition and fees available annually to veterans under the Education Law, Sec. 608 are denied to veterans who received a discharge certificate other than honorable. The General Business Law extends many benefits to honorably discharged veterans, such as exemption from the fee for a peddler's license in Sec. 32.

The brief description of the benefits available under State and Federal law as set forth above, clearly establishes the property rights denied to a veteran with a less-than-honorable discharge. Harmon individually and representing a class of veterans who have received less than honorable discharges are excluded from the benefits available to them under Federal law and the laws of their respective States.

We respectfully submit that this deprivation of property rights is a substantial one and requires a critical examination of the military administrative procedures which permit same and the authority of the military to condition a discharge on the exercise of constitutionally protected rights.

(B) Loss of Private Benefits

The immediate and continuing injury that a veteran suffers as a result of a less-than-honorable discharge founded upon disloyalty or security grounds is far reaching, affecting every facet of the veteran's life. Mr. Justice Clark speaking for this Court in *Wiemann* v. *Updegraff*, 344 U. S. 183, 73 S. Ct. 215, at 191, stated:

> "There can be no dispute about the consequences visited upon a person excluded from employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when each man begins to eye his neighbor as a possible enemy."

The experience of the Workers Defense League developed over the past seven years in assisting young American men faced with the dilemma of a military security proceeding is best summed up by Rowland Watts: "The Draftee and Internal Security, A Study of the Army Military Personnel Security Program" (New York, 1955), pp. 7-8.

> "It brands a man for his non-criminal perfectly legitimate activities at the age of fifteen. In one case, it had threatened to brand him for his alleged associations at the age of eight. It threatens to brand a man for the accident of having been born into a politically unacceptable family. It threatens to brand him, if he marries a girl whose family is politically unacceptable. This 'branding' is not a theoretical thing. A man with an 'Undesirable' discharge from

the Army has little hope of getting an industrial job or any job with a productive future."

These are the comments of the man who conducted the most extensive inquiry into the military personnel security program.

Many young men throughout the United States have submitted sworn statements to the Workers Defense League testifying to the consequences of a less-than-honorable discharge. The consequences cover the full gamut of human misery, not simply financial loss and hardship, but isolation from family, friends and neighbors, a desperate search for vocation when the usual avenues are foreclosed and most important, the loss of respect and dignity in the community of men.

We will very briefly recite extracts from the statements submitted to the Workers Defense League. The identity of the individuals will be limited to the disclosure of their military serial numbers. This limited disclosure is necessary to avoid any further hardship.

US 51 324 358

"Besides the difficult emotional strain of adjustment to civilian life, hampered by the undesirable discharge, the family tension—there was a real problem of economic strain. Loss of mustering out pay, difficulty of finding a job in a non-defense, non-screened industry. Electronic technician. The good paying jobs in the defense industry were closed to me.

"Decided to return to school and matriculate for a degree in Electrical Engineering. Was denied the

G. I. Educational Benefits by N. Y. State Veterans Administration.

"Made an application for a disability claim against U. S. Army prior to discharge. . . . . This claim was denied by US Army because of the nature of my discharge."

US 56 216 946

"Unemployment, some family and financial difficulties.

"My work xperience (and chosen field) was in journalism. I was unable to find any newspaper job until this year. (From Nov. 54 until March 57, I was a truck-driver.)

"It would be an exaggeration to say that my UD was solely responsible for my present separation from wife and children. But the strain of unemployment, unsuccessful appeals, etc. certainly played a part."

WA 8 108 495

"Had difficulty finding a job where knowledge of type of discharge existed.

"Was accepted at two jobs, then discharged. Was refused bond for a job requiring my handling precious metals, thus, occasioning the loss of the job.

"Was refused admittance to CCNY.

"Spent almost two years in a state of indecision—when resolved unsatisfactorily, may account for my nervousness and inability to sleep.

"Family life completely disrupted, relations with father and mother. In the case of my friends, sur-

prise and shock—and in many cases, withdrawal of their friendship."

US 52 055 415

"Unable to follow vocation desired; VA has not approved my vocational rehabilitation. Ohio Korean Bonus now being held up."

US 52 198 508

"Those who knew about my discharge reacted in a mixed way. Some it didn't affect. Others it made more apprehensive as to certain continued associations on the grounds of possible affect to themselves.

US 51 198 578

"Could not get a job because my discharge did not meet with employers' standards. Mentally I became depressed, and physically run down."

ER 55 147 139

"In November 1951, I was drafted into the Army. During my 23 months in the Army, I served 16½ months in Korea, some of which time was spent in the front lines. I was honorably released on September 28, 1953 and placed in the inactive reserves. On February 29, 1956, two years after being out of the service, I had a hearing before a "Field Board of Inquiry" because of alleged associations with organizations listed as subversive by the U. S. Attorney General. These charges were made by nameless informers after my active service terminated and covered a period after my honorable release [Received undesirable discharge April 1957].

US 51 324 252

"The main reason I have delayed my application to the Character Committee of the New York Bar for license to practice law has been the undesirable discharge.

US 56 238 440

"Lost job at Bank of America."

"Have neurology problem manifest one year after discharge (the link to Army is a definite possibility according to my neurologist)".

AF 52 292 253

"Duodenal ulcer precipitated within 6 weeks of date of separation. Healed by medical management 6-8 weeks after that but insurance affected (one sickness and accident policy denied, others "rated")."

US 56 222 801

"The main one was the refusal of the Department of Education at U. C. L. A. to allow to practice teach in order to get my Secondary Teaching Credential. Plus many, too many to enumerate."

US 56 199 421

"This type of discharge puts you under great mental anguish about losing your job and not being able to find another one."

OI 549 260

"None from the discharge itself. However, the affair as a whole cost me about $400, hundreds of hours of work, and very considerable nervous strain."

US 56 233 816

"Despite M. A. degree from U. of California and enough credits for P. H. D., I decided to get job and not return to school. Who would hire a college teacher with Undesirable Discharge? I may return to University now that I have Honorable."

US 55 435 123

"I was refused a Teacher's certificate by the Chicago Board of Education."

The above quotations, taken directly from the statements furnished the W. D. L., are set forth here to establish the unfortunate scope of the injury to young men and women like John Harmon. The scarlet letter of disloyalty marks them for life in every avenue of activity. It denies to them the normal intercourse among the community of men. It forecloses the usual development pursued by young people in employment, and education. They are barred for life from all the customary institutions of society.

We respectfully submit that this lasting injury dramatically shows that we are not dealing with an abstraction. With this background, the unconstitutional acts of the military stand out in sharp relief, contrary to our laws, our Constitution, to the very essence of ethical conduct.

II. The Department of the Army has no authority to conduct an inquiry into constitutionally protected, innocent, non-criminal, civilian activities; nor to employ improper procedures; nor to determine the character of discharge on the basis of such activities.

An examination of the *Universal Military Training and Service Act of 1948*, 62 Stat. 604, 50 U. S. C. A. 451 et seq. and the Act of May 5, 1950, 64 Stat. 145, 10 U. S. C. A. 652a fails to reveal any authority in the Department of the Army to characterize a discharge on the basis of constitutionally protected activities.

The Act authorizes the removal of persons inducted into the Army and the establishment of procedures to affect that purpose. We concede that the Department of the Army may remove alleged "security risks"—but we object to the character of discharge being predicated upon constitutionally protected activities. Neither Congress, nor any agency of the government has the authority to injure a man or deprive him of his property because he has exercised his constitutional rights. The Supreme Court during the history of our Constitution has emphatically upheld this contention as an axiom of our law.

Judge Edelstein stated in *Bernstein v. Herren* (D. C., S. D., N.Y.) 136 F. Supp. 493:

> "An honorable discharge encompasses a property right, as well as civil rights and personal honor. If an honorable discharge were denied to a soldier

with an unexceptionable service record, on the basis merely of pre-induction conduct, it would be in my opinion a deprivation of property without due process of law, and a regulation establishing a procedure for affecting such a denial could not be authorized by Statute.

In *United States ex rel. Toth* v. *Quarles,* (No. 3 Oct. Term 1955, 24 Law Week 4005) it was held that after the discharge of a soldier he cannot even be held by the Army to a trial for a crime alleged to have been committed while he was in service. It is certainly not contended that the Army could try a soldier for a crime alleged to have been committed prior to his entry upon service. Yet to put a soldier in jeopardy of a less-than-honorable discharge for acts committed prior to induction and for acts which were not criminal—is scarcely less offensive to our notions of rudimentary fairness."

We recognize the authority of the military establishment after a fair and impartial hearing to discharge a soldier on the basis of good and sufficient cause. However, the individual is then entitled, as a matter of right, to a discharge, based upon the character of service he has rendered.

Former Secretary of the Army, Mr. Stevens, conceded this point by stating:

"The traditional policy of the Army has been that the discharge given should reflect the service rendered. In other words, a man whose conduct has been faithful and honest during his time in the service, would be entitled to separation under

honorable conditions, notwithstanding what his conduct may have been prior to entering the service." (Hearings before the Senate Committee on Armed Services on Doctor Draft Act Amendments, 83rd Cong., 2nd Sess. 75 (1954).)

The Army has promulgated regulations pursuant to Congressional authority which were inconsistent with the security program. Army Reg., 41 Stat. 809 (1920), as amended 10 U. S. C. Sec. 652a (1952) states that the purpose of a discharge certificate is "to specify the character of service during the period covered by the discharge." U. S. Army Reg. No. 615-375, paragraph 2(b) (1951).

Those acts which an inductee committed prior to induction are not within the jurisdiction of the Army. We are deeply concerned that in these difficult times, the military establishment seeks to control by threat of unfavorable discharge, the civilian life of an American. The Army can remove a man from the service, but it can not discharge him, defame him and penalize him for innocent, constitutionally protected civilian activities. To [illegible]e him a discharge other than honorable when the character of his service is unquestionably "honorable", is an act of defamation specifically prohibited by the First Amendment. *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123 (1951), Frankfuter, J. concurring at p. 149, *United States* v. *Ballard*, 322 U. S. 78.

Should Congress enact legislation authorizing the Army to characterize a discharge on the basis of civilian activities, such legislation would be declared

invalid as a "Bill of Attainder." *United States* v. *Lovett*, 328 U. S. 303, 317, 318. It is likewise invalid as punishment without a judicial trial in violation of the Sixth Amendment. Punishment was defined by the United States Supreme Court in *Cummings* v. *Missouri*, 4 Wall. 277, at pp. 321-322 as follows:

> "The theory upon which our political institutions rest, is that all men have certain inalienable rights —that among them are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of all these rights all men are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment and can be in no otherwise defined." Also see, *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410.

The Army likewise denied all the basic elements of procedural due process. What due process means with military proceedings as in all situations flows from the concept of elemental fairness. *Burns* v. *Wilson*, 346 U. S. 137 and 844 (1953). Harmon was denied the right to be informed of the charges against him, to be confronted by his accusers, to cross-examine witnesses for the government, to a fair and open hearing, to challenge for cause members of the administrative determining bodies and especially, to be represented by counsel.

Passing the question of authority, it is impossible to find that the military satisfied the minimum standards of procedural due process.

Conclusion

The United States Army has asserted jurisdiction over the civilian phase of the lives of thousands of young men and women. Neither law nor custom vests this authority in the military establishment. Lacking the authority, however, the Army has violated the Constitutional guarantees of due process. In consequence of this usurpation of authority, the Army has punished, in a substantial and continuing form, hundreds of young men and women. We respectfully submit to this Court that the Army has acted without authority and in violation of the Constitution of the United States. We respectfully request that this Court declare the Army regulations pursuant to which the Military Personnel Security System is founded, ultra vires, illegal and void, and order the issuance of an honorable discharge pursuant to the customary authority and procedures, to John H. Harmon, III.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1957.

No. 141.

HOWARD D. ABRAMOWITZ,

Petitioner,

vs.

WILLIAM M. BRUCKER,

Respondent.

No. 80.

JOHN HENRY HARMON, III,

Petitioner,

vs.

WILBER M. BRUCKER, etc.,

Respondents.

BRIEF FOR SERVICEMEN'S DEFENSE COMMITTEE AS AMICUS CURIAE.

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IN THE

Supreme Court of the United States

October Term, 1957.

No. 141.

HOWARD D. ABRAMOWITZ,

Petitioner,

vs.

WILLIAM M. BRUCKER,

Respondent.

No. 80.

JOHN HENRY HARMON, III,

Petitioner,

vs.

WILBER M. BRUCKER, etc.,

Respondents.

BRIEF FOR SERVICEMEN'S DEFENSE COMMITTEE AS AMICUS CURIAE.

Preliminary Statement.

This brief is being submitted on behalf of a group of young American citizens who, for purposes of mutual aid and protection, have organized themselves into an informal organization known as the "Servicemen's Defense Committee". All of the members of this Committee will be directly or indirectly affected by the decisions of this Honorable Court in the above-entitled

matters. The impact of these decisions upon them will not be slight. The future course of their entire lives will be freer and more secure or will continue under severe and permanent handicap, all dependent upon the outcome of this litigation. It is this personal interest in the outcome of these cases, together with the belief of *amicus curiae* that it may be of some assistance to the Court in resolving the questions presented in these cases that has led to their securing the consent for the filing of this brief.

All of the members of the Committee were drafted into the Armed Forces of the United States within the past seven or eight years. Each of them possesses an excellent record of military service. Yet, each of these young men was separated from service with an undesirable discharge. These discharges have plagued every one of them in one manner or another and have resulted in the denial of benefits to them which other young men who served their country well have received and are receiving.

In each case the reason for the discriminatory treatment accorded to these men is substantially the same. Subsequent to induction each of them was requested to fill out a form stating whether or not he had ever been a member of or associated directly or indirectly in any manner whatsoever with any of the organizations which had been listed as subversive, Communist or Fascist by the Attorney General of the United States. Like all other inductees these men were advised that they had the right to refuse to answer these questions on the grounds that their answers would compel them to be witnesses against themselves, thereby entitling them to the protection of the Fifth Amendment. There was no intimation that the

exercise of the constitutional right thus proffered could result in punishment of the individuals involved. Each of these young men refused to answer the questions thus put relying upon their constitutional privilege.

Thereafter proceedings were instituted against them by virtue of letters of allegations, which letters set forth the grounds on which it was asserted each individual was subject to discharge from service under conditions other than honorable. The claim of the Fifth Amendment privilege appeared in these letters of allegations as one of the grounds which might subject the individual to the punitive action indicated. All of the other grounds in each instance consisted of pre-induction activity of a completely legal character, all within the area of belief, speech and association protected by the First Amendment. The allegations extended to such conduct not only of the individual directly involved but of his parents, relatives and friends. In most instances there was an allegation of pre-induction Communist Party membership generally several years prior to the induction date, but in no instance was there an allegation that the membership was related to either unlawful activities or scientur of evil purpose. Other allegations refer to attendance at meetings of organizations such as the California Emergency Defense Committee and the National Council of American-Soviet Friendship, both cited as subversive and Communist by the Attorney General of the United States. Membership in organizations such as the Progressive Citizens of America at a time when it was a part of a party on the ballot in the State of California[1] (but

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[1]*Cf. Konigsberg v. State Bar*, 353 U. S. 257; *Sweezy v. New Hampshire*, 354 U. S. 234.

which was cited by the California Committee on Un-American Activities as subversive), and membership in similar organizations were typical of items included in the allegations. The signing of petitions addressed to the legislature and to the executive branch of the government, opposition to some aspects of the foreign policy of the United States, and similar expressions of ideas were likewise included therein.

Upon the basis of such letters of allegations hearings were held for each of the individuals involved before Army Boards, at which hearings the Boards considered as evidence against each of these young men a secret file which neither he nor his counsel was allowed to see. No witnesses were produced against any of them and each was denied confrontation of witnesses and the opportunity of cross-examination. The young men involved denied that they believed in or had ever advocated force and violence or had belonged to an organization which to their knowledge so advocated. They denied that they had engaged in any illegal or improper activities either as civilians or otherwise. In each instance evidence was introduced both from the military superiors of the individuals involved and their co-enlisted men bespeaking the excellence of the service they rendered while members of the Armed Forces. In each instance objections to the proceedings upon grounds which will hereinafter be indicated were made. Without exception these young men received undesirable discharges, each of which has been sustained after review by the Army Discharge Review Board upon the basis of the record which had been made before the Army Board, including the secret record to which access was denied to the individual involved and his counsel at all stages.

The excellence of the service of some of these men and their superior qualities received specific recognition from superiors high in rank.[2] Their discharges have resulted in deprivation of the benefits of the "G.I. Bill", and this in turn has made it impossible for certain of them to pursue their education. Others desire to follow professional careers—one or two as lawyers. The nature of their discharges constitutes a serious blemish upon their good character which may present obstacles to their admission. Indeed the discharges of all have placed them under a cloud which adversely affects both economic and social opportunity.

In each of the cases the following objections were raised at all stages of the proceedings:

1. The long delays of the Armed Services in processing the cases of the alleged security risks and the timing of the discharges so as to require virtually full service but to assure separation prior to the regular date thereof, together with the positions of responsibility entrusted to and faithfully carried out by these individuals indicates that the purpose of the discharge in each case was not the security of the Armed Forces but that of imposing punishment upon the individuals involved for their alleged nonconformity.

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[2]For example, on July 9, 1954, there was a request for a waiver of time in order to promote one of these men to corporal, made by the Lt. Col. under which he was serving with the following statement: "Subject has on occasion assumed the duties of the battalion sargeant major and the consistency of the superior work produced by him definitely indicates an ability to perform duties required of a position higher than E-4." This man was nevertheless kept in the lowest possible rating, while he continued to perform duties of high responsibility, until he was ousted by an undesirable discharge from the Armed Forces shortly before his regularly scheduled discharge date.

2. In each case the individuals were punished because of their alleged ideas and associations contrary to the guarantees of the First Amendment.

3. In each case the guarantees of the Fifth Amendment were violated by imposing punishment for the claim of the privilege which both the Constitution and the Armed Forces had guaranteed.[3] As a matter of fact the proffer of the privilege together with the subsequent punishment for the claim raises serious questions of entrapment.

4. The nature of the proceedings violated the constitutional provisions against bill of attainder and *ex post facto* proceedings. In each instance the conduct complained of was legal at the time it was allegedly engaged in. It was thereafter declared to be a basis for punishment of those young men who were required by the law of this country to enter its armed forces and serve therein.

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[3]On February 1, 1955, Secretary of the Army Robert T. Stevens wrote to Sen. Joseph R. McCarthy in part as follows: "Your letter also suggests that Bielski, an inductee, be given a dishonorable discharge because he invoked the Fifth Amendment before he came in. In the absence of any evidence of subversive conduct, this would mean that a person who is forced into service by induction and required to serve two years must look forward at the end of this obligated service to a dishonorable discharge merely because he has availed himself of a right guaranteed by the Constitution no matter how well he shall have performed his assigned duties. Aside from legal considerations, such a policy in terms of morale and discipline in the armed forces would be most impracticable. Furthermore, from a legal standpoint, I am advised that this is untenable and would be in direct conflict with the recent pronouncements of the Supreme Court on this very subject. . . . ." Nevertheless, the Armed Forces continued thereafter to include in allegations leading to undesirable discharges the fact that the privilege of the Fifth Amendment had been claimed.

5. The proceedings violated the due process guarantees of the Fifth Amendment in each of the following respects:

a. In each instance a presumption of guilt was substituted for the required presumption of innocence.

b. Punishment was predicated upon secret evidence never disclosed to the individual involved or his counsel.

c. There was a complete denial of confrontation and the right of cross-examination of witnesses.

d. The charges were vague and indefinite and demands for full particulars were denied.

6. The doctrine of separation of powers was violated by the proceedings in the following respects:

a. The military, a subdivision of the executive branch of the government, exercised legislative powers by adopting the regulations under which the undesirable discharges were issued, and judicial powers by conducting the trial of individuals charged with "subversive" civilian activities.

b. The Armed Forces have absolutely no power over the conduct and activities of civilians. It may not usurp such power by the device of exercising jurisdiction over a member of the Armed Forces in such a manner as to penalize him for conduct in which he is alleged to have engaged as a civilian. To give to the Armed Forces of the United States power of the kind here exercised is to vest it with control over the lives of civilians; for the power to punish for civilian activities is the power to control

these activities. The Armed Forces have delegated to themselves the right to say to the civilian youth of this land what organizations they may belong to, with whom they may associate, what they may read, what kind of parents they may live with, what kind of thoughts they may have, and what political parties they may join. This claim of power by the Armed Forces of the United States would substitute military control of civilian life for the civilian control of the Armed Forces contemplated by the Constitution of the United States.

It is with this last point that this *amicus* brief is concerned, all of the other points being adequately covered in the opinion of *amicus curiae* in the briefs filed on behalf of the petitioners. Its importance to this litigation is underlined by the observations in the main opinion in *Reid v. Covert*, 354 U. S. 1, that the President and his subordinates may well be exercising "legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." The brief which follows essays to demonstrate that when the military attempts to try its subjects for their preinduction, civilian conduct it exercises a blend of functions that gravely offends constitutional requirements of separateness.

The Application of AR 604-10 so as to Impose Punitive Discharges Upon Inductees, Based Solely on Their Pre-Induction Conduct as Civilians, Constitutes the Unconstitutional Exercise of Legislative and Judicial Power by the Military in the Area of Civilian Life.

For the reasons assigned in the petitioners' briefs the discharges issued them were punitive in effect and perhaps in design. These young men, like the ex-servicemen for whom your *amicus* speaks, were co-opted into the military service by operation of law. These are not volunteers, and in all cases their induction was involuntary if not contrary to their will. The conduct upon which the discharges were based occurred prior to their induction when they, or their relatives, or associates, were acting only in a civilian capacity in no wise related to any status, capacity or service encompassed within the "Armed Forces". See Uniform Code of Military Justice, Art. 1, sub. 2; Art. 2; 50 USCA 551, 552. The punishment affects them in civilian life far more than in military life. For upon receipt of the discharge the inductee is finished with military service. But the dishonorable discharge remains with him in civilian life to affect his employability or his admission into a professional career, and, in this fashion, a broad range of economic and social opportunity. It is not far fetched to say that such a discharge may constitute a turning point in the life of every inductee receiving one.

The question then is whether such inductees may be subjected by the military to punitive discharges for reason connected only with their pre-induction civilian conduct, association and family relationships. Aside from the contentions of petitioners themselves, and without gain-

saying a word of their arguments, we urge that the power here asserted by the military offends the constitutional doctrine of the separation of powers.

The Army acts under AR 604-10.[4] This document does not on its face recite any statutory or other authority. It is relevant however that the President and his subordinates are given certain general rule-making powers; they can prescribe rules and regulations for "the procedure, including modes of proof, in cases before courts —martial, courts of inquiry, military commissions and other military tribunals" (Arts. 36 and 140, Uniform Code of Military Justice, 50 USCA 611, 736). As to inductees such as petitioners, rule-making authority is conferred by the Universal Military Training and Service Act (June 24, 1948, c. 25, Title I, 62 Stat. 604, 50 USCA, App. Sec. 451 ff). There it is provided that inductees shall serve for a period of 24 months "unless sooner released, transferred or discharged in accordance with procedures prescribed by the Secretary of Defense . . ." (Sec. 4(b), 50 USCA, App. 454(b)) and that the President or his delegate is authorized "to prescribe the necessary rules and regulations to carry out the provisions of this title . . ." (Sec. 10(b) and (c), 50 USCA, App. 460(b) and (c)).

If AR 604-10 rests upon a statutory grant of rule-making authority, it would seem that the provisions just cited are its foundation. To construe and apply them so as to authorize the issuance of the punitive discharges on the grounds here involved is to treat them as delegat-

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[4]The text appears in *Government Security and Loyalty, A Manual of Laws, Regulations and Procedures*, Bureau of National Affairs (Washington) Chapter III, Military Personnel Security, pp. 31,71 ff.

ing to the military, legislative and judicial power reserved to the Congress and the courts under our Constitution. This is so as to legislative power because neither in the specific statutory clauses already adverted to, nor in the complex of statutes representing Congressional "rules for the government and regulation of the land and naval forces" (U. S. Const. Art. I, sec. 8, ch. 14) is there any declaration of policy or rule that persons once inducted into those forces may be punished by the military for civilian conduct. The delegation of judicial power is effected by the attempt to substitute a truncated administrative procedure for a judicial trial as the method of determining imposition of such punishment.

If, on the other hand, AR 604-10 purports to exercise inherent disciplinary powers it is an arrogation by the military of legislative and judicial power. It offends the Constitution in the same measure as just described but here without even the pretense of statutory authority. This is the military acting upon its own *ipse dixit*.

Deep in our institutions and traditions lie the reasons for the proposition that the powers of the military should be strictly confined to its own sphere, and subordinate to the civil authority. This Court has recently spoken of the three landmark cases manifesting "the deep-rooted and ancient opposition in this country to the extension of military control over civilians" *Reid v. Covert*, 354 U. S. 1. The cases there cited are *Ex parte Milligan*, 4 Wall. 2, and *Duncan v. Kahanamoku*, 327 U. S. 304, wherein assertions of martial law, outside the area of combat and while civilian administration and courts were still operating, were repulsed, and *Toth v. Quarles*, 350 U. S. 11, denying the military the power to try a dis-

charged serviceman for offenses committed while in service. The *Reid* case itself adds another such bench mark in vouchsafing to wives and children accompanying servicemen to foreign basis (even at the military's expense and living within the overseas communities created and administered by the military) the constitutional protections of judicial trial and due process.

Out of this history can be written at least this much logic—that it would take the most clear and unambiguous enactment by Congress to lead this Court to construe any statute as giving the military power to devise punishments and reprisals for civilian conduct. For to do this, as the petitioners' briefs so convincingly show, is of necessity to control civilian life to a marked degree. Not only will the employment, professional, economic and social lives of these victims of the military's punishment be forever blighted by the badge of infamy affixed to their records; but many thousands more, aware of the military's power, will before induction abstain from conduct and associations in all fields that actually or potentially run afoul of the military's interdiction. History and the inherent qualities of the military's action combine to require of the Congressional enactments a manifest intent to empower the military to adjudge civilian conduct, before it would be concluded that an attempt to confer such power had been made. No such power is so much as hinted at in any of the relevant legislation.[5]

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[5]Even were the statutes here capable of such a construction grave constitutional problems would be presented. Consistent with its usual practice this Court will refrain from a construction that needlessly presents constitutional difficulties. *United States v. Rumely*, 345 U. S. 41, 46.

1. AR 604-10 as an Exercise of Legislative Power.

Nowhere in the pertinent legislation is there a declaration by the Congress that persons whose civilian conduct only renders them potential "security risks" shall for that alone be visited with any punishment, sanction or reprisal. It is essential to a valid delegation of quasi-legislative power that there be from the Congress a declaration of a meaningful and definite standard which the executive may make effective upon finding the occurrence of certain facts properly found or proclaimed, *The Aurara*, 7 Cranch 382; *Marshall Field v. Clark*; 143 U. S. 649; or such a standard which as a practical matter can be stated only in general terms and the executive is to effectuate so as "to fill up the details" with application to specific facts, *Wyman v. Southard*, 10 Wheat. 1; *Buttfield v. Stranahan*, 192 U. S. 470; *Monongahela Bridge Co. v. United States*, 216 U. S. 177; or such a standard which is realized by particular determination made upon an ascertainment and evaluation of manifold and changing fact situations. *St. Louis I. M. & S. R. Co. v. Raylor*, 210 U. S. 281; *Intermountain Rate Cases*, 234 U. S. 476; *Avent v. United States*, 266 U. S. 127; *N. Y. Central Securities Corp. v. United States*, 287 U. S. 12; *J. W. Hampton, Jr. & Co. v. United States*, 276 U. S. 394; *United States v. Rock Royal Cooperative*, 307 U. S. 533; *Opp. Cotton Mills v. Administrator*, 312 U. S. 126; *Yalues v. United States*, 321 U. S. 414; *American P & L Co. v. S. E. C.*, 329 U. S. 90; *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146. But absent the declaration of a rule of conduct or of an objective to be attained, the performance of the legislative function by the Congress is wanting and the law-making

power is delegated to the executive. *Schechter v. United States,* 295 U. S. 495; *Panama Refining Co. v. United States,* 293 U. S. 388.

Here on the question of imposing punishment (in military *and* civilian life) for civilian conduct there has been no rule of conduct enacted by the legislature, and no declaration of policy to be effectuated by any administrative process. On this the statutes are silent, and all in our traditions cries out to negate the implication of such a rule or policy from either Congressional pronouncement or the purposes and objectives of military service. To find such a rule or policy in the legislative grant of authority to prescribe "procedures" for release, transfer or discharge of inductees (50 USCA, App. 454(6)) or the warrant to "prescribe the rules and regulations to carry out" the Universal Military Training Act (50 USCA, App. 460(6)) would involve plain judicial legislation. The Uniform Code doubtless was designed to make possible an efficient and well-disciplined military establishment. But neither the power and machinery to conscript nor the authority to discipline those within the Armed Forces carries with it the power to adjudge individuals for their civilian conduct and penalize them in their civilian careers.

The *Schechter* case, *supra*, seems particularly apposite. There the Congress declared its policy in a broad and all-encompassing statement of aims and gave the executive full discretion as to whether to achieve them and the means to be used. There was enacted no rule of conduct to be achieved by specified means. There the executive was authorized to, and did, promulgate the rule of conduct; he set the objectives for various industries and the means of achieving them. His codes fulfilled the function

of the legislature. Here there is no rule of conduct or declaration of policy—none at all. To the extent that this be sought in the aim of maintaining effectiveness and discipline, this pertains to the military forces themselves, not civilians in civilian life. Here the executive has promulgated a code. Only in it are the rules of conduct and the policy and aims declared so as to apply to civilian conduct and to warrant punishment in civilian life. Here also it is the code, not the statute, which has prescribed the rule of conduct or policy.

Nor can the exercise of legislative power by the executive be justified for the reason that the executive acts for what he conceives to be the public good. The best of motives do not substitute for constitutional authority. *Panama Rfg. Co. v. United States, supra,* p. 420. The all-out campaign to expose and ostracize actual or putative communists and non-conformists as well as to subject them to grave economic privation may even from this vantage point in history appear to have been as irrational as it was destructive of essential liberty.[6] But, good or bad, these efforts must be undertaken consistently with the requirements of the Constitution.

On the other hand, and apart from rule-making powers conferred by statute, it has been stated that "Military Personnel Security, unlike other government screening programs, rests neither on Congressional enactment nor Executive Order but is based on the inherent disciplinary powers of the military organization.". (BNA Manual,

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[6]See *e.g., Konigsberg v. State Bar,* 353 U. S. 257; *Schware v. United States,* 353 U. S. 232; *Watkins v. United States,* 354 U. S. 178; *Sweezy v. New Hampshire,* 354 U. S. 234; *Yates v. United States,* 354 U. S. 298; *Wilson v. Loew's, Inc.,* Petition for Certiorari Pending No. 552, October Term, 1956.

supra, p. 31:1). A similar but more oblique suggestion was made by the court below. *Harmon v. Brucker* (C. A. D. C.) 243 F. 2d 613, 619, 620. Since under Art. I, sec. i, cl. 14 of the Constitution only the Congress can confer powers relating to the "government and regulation of the land and naval forces," the theory of inherent power can mean only that, taking as a whole the provisions of statutory law pertaining to the Armed Forces, they evidence a policy and objective of effectiveness and discipline which authorize AR 604-10. But the Uniform Code of Military Justice, as well as its predecessors, plainly show that both in the declaration of offenses and the prescribing of punishment specific Congressional enactment has always been regarded as essential. For always these documents have spelled out offenses and punishments with the specificity of a criminal code. And this has been for persons clearly in the Armed Forces and for conduct in a military connection.

In a case involving a charge of misconduct during an enlistment terminated by honorable discharge it was held that specific statutory authority would be required to try and punish the individual following a re-enlistment *Hirshberg v. Cooke*, 336 U. S. 210. *A fortiori* in the case of a man punished for civilian conduct. To hold otherwise would run counter to the fixed policy of strictly confining military power. "It it an unbending rule of law that the exercise of military power, where the rights of citizens are concerned, shall never be pushed beyond what the exigency requires." *Raymond v. Thomas*, 91 U. S. 712, 716, where the military was acting as a legally constituted occupying force after the end of hostilities in the Civil War. In *Duncan v. Kahanamoku*, *supra*, the military was denied authority to try civilians for civilian

offenses even during wartime and in a war theater, where civilian authority was still able and willing to function. See also *Reid v. Covert, supra.* We submit that there is no significant difference between military trials of civilians for civilian offenses and military trials of members of the Armed Forces for offenses, if such they were, committed while they were civilians and beyond military jurisdiction.

In this connection a sentence from Mr. Justice Minton's dissent in *Toth v. Quarles,* 350 U. S. at 44, is relevant. "A civilian not under the jurisdiction of the Military Code has a right to be tried in a civil court for an alleged crime as a civilian." That after the alleged offense the actor is inducted cannot change the situation. If a civilian committed murder before induction he could not be tried by a military court-martial merely because of his supervening induction. To hold otherwise is to go far beyond the meaning or implication of anything Congress has enacted. It would extend upon a mere technicality, to the military a long reach over the administration and control of civilian life.

2. AR 604-10 as an Exercise of Judicial Power.

Civilians who are to be punished for civilian offenses are entitled to judicial trials by Art. 3 courts. They are entitled to an examination of their case by a grand jury, trial by a jury, proper pleading of the charge and a tribunal presided over by a judge rendered as independent of all other branches of government as constitutional safeguards can render him. "Every trial involves the exercise of judicial power" and this is vested only "'in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish,' and

it is not pretended that the [military] commission was a court ordained and established by Congress." *Ex parte Milligan, supra,* at p. 121.

The right to a judicial trial of offenses committed by civilians acting as such goes to the essence of our institution:

> "Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. . . . Legislatures and Courts are not merely cherished American institutions; they are indispensable to our government.
>
> "Military tribunals have no such standing." (*Duncan v. Kahanamoku, supra,* p. 322.)

There is wanting in the statutory foundation for the regulation any provision for the usual incidents of a judicial proceeding. No enactments of Congress provides a tribunal to perform the adjudicative function. No provision is made for a hearing in the constitutional sense of notice, confrontation, cross-examination and opportunity to rebut the case against the accused. No procedures are created for judicial review.[7]

The hearing boards created by AR 604-10 are doubly defective. They lack any statutory authorization. They result from a military *tour de force* to act, in the premises of these cases, without authority and in order to adjudicate offenses against rules of conduct that Congress has not enacted. But more important they purport to try people for conduct in civilian life and as such they are

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[7]Indeed, here as below, the government appears to claim that the Army action in determining the charges is not open to judicial review. 243 F. 2d at 617-618.

an ineffectual usurpation of judicial power that must, in this case, be exercised only by constitutional courts.

For all these reasons AR 604-10 as here applied gravely offends the constitutional principal of separation of powers. In these premises it constitutes a menacing invasion of areas heretofore reserved for civilian authority.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1956

No. 1141

HOWARD D. ABRAMOWITZ,

Petitioner,

v.

WILBUR M. BRUCKER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Dated, May 27, 1957

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IN THE

Supreme Court of the United States

October Term, 1956

No.

—o—

HOWARD D. ABRAMOWITZ,

Petitioner,

v.

WILBUR M. BRUCKER,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Opinions Below

There was no opinion in the District Court. The order granting summary judgment dismissing the complaint is set forth in the Joint Appendix filed in the Court of Appeals at page 22.

The Court of Appeals filed a *per curiam* memorandum, a copy of which is annexed hereto as Appendix A. The judgment of the Court of Appeals is annexed as Appendix B. It held that *Harmon* v. *Brucker*, — F. 2d — (1957), was controlling, with one of the three members of the panel expressing dissent from the *Harmon* case and a second recording reservations about that decision. A writ of

certiorari was granted in the *Harmon* case (October 1956 Term, No. 777) on May 13, 1957. The Court of Appeals opinion in the *Harmon* case will be submitted with this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on April 26, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions involved are the First and Fifth Amendments to the Constitution of the United States and Article I, Section 9 thereof.

The statutes involved are:

a) The Act of May 5, 1950, 64 Stat. 145, 10 U. S. C. 652a:

> "No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial."

b) Section 248 of the Armed Forces Reserve Act of 1952 (Act of July 9, 1952, 66 Stat. 481, 495, 50 U. S. C. 991):

> "Subject to the provisions of this chapter, the discharge of commissioned officers of the reserve components shall be effected at the pleasure of the President, and the discharge of other members of the reserve components shall be in accordance with regulations promulgated by the appropriate Secretary."

c) Section 249 of the Armed Forces Reserve Act of 1952 (66 Stat. 481, 495, 50 U. S. C. 992), which reads in relevant portion, as follows:

> "(a) • • •
>
> (b) The President or the appropriate Secretary may drop from the rolls any member of the reserve components who has been absent without authority from his place of duty for a period of three months or more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a Federal or State penitentiary or correctional institution.
>
> (c) A member of a reserve component discharged or separated for cause other than as specified in subsection (b) of this section shall be given a discharge under honorable conditions unless—
>
> (1) a discharge under conditions other than honorable is effected pursuant to the approved sentence of a court-martial or the approved findings of a board of officers convened by competent authority, or
>
> (2) the member consents to a discharge under conditions other than honorable with waiver of court-martial or board proceedings."

The regulation involved is Army Regulation 604-10, set forth, in relevant part, in Appendix C to this petition.

Statement of the Case

Petitioner is a citizen of the United States and a resident of the State of New York. On October 15, 1951 he was inducted into the Armed Forces pursuant to the Universal Military Training and Service Act of 1951, 50 App. U. S. C. 451 *et seq.* He was released from active service on June 30, 1953, after having seen active service in the Korean conflict (J.A. 2, 12, 13). At that time he

received an honorable separation from active duty and, pursuant to statute (50 App. U. S. C. 454), was transferred to the inactive Reserves (J.A. 2, 3, 13).

On July 15, 1955, petitioner received a communication from the Army stating that information had been received which furnished reason to believe that petitioner's retention in the Army "may not be clearly consistent with the interests of the national security." The "allegations" against appellant were that during 1948 and 1949 he was a member of the Communist Party; that from 1949 to 1951 he was a member of the Labor Youth League; that from 1946 to 1948 he was a member of American Youth for Democracy and that in 1950 he was a subscriber to the "Worker". The Communist Party, the Labor Youth League and American Youth for Democracy were all described as organizations "cited by the Attorney General of the United States" as subversive or as Communist. Petitioner was advised that he could request a hearing, submit a rebuttal in writing, or elect discharge from the Reserves with the understanding that such discharge might be "undesirable" (J.A. 5-7).

Petitioner chose to submit a letter of rebuttal, in which he pointed out that the allegations related exclusively to his pre-induction political activities and asserted that they did not constitute lawful and proper ground to deprive him of his status as a member of the United States Army or to discharge him under conditions other than honorable (J.A. 8-10).

On September 13, 1955, petitioner received an undesirable discharge from the Armed Forces of the United States (J.A. 10). Thereafter he filed successive applications for review of the discharge with the Army Discharge Review Board and the Board for the Correction of Military Records. Both applications were denied (J.A.

3, 11, 21). There are no further administrative remedies available to petitioner.

The regulations under which the Army proceeded initially were SR 600-220-1, superseded by Army Regulation 604-10 a few days after the original letter of allegations. For present purposes the old and new regulations are identical. They set up a series of loyalty criteria for service in the Army, patterned generally after the criteria prescribed for Government civilian personnel in Executive Order 10450, with which this Court is familiar. See *Peters* v. *Hobby*, 349 U. S. 331; *Cole* v. *Young*, 351 U. S. 536. AR 604-10 provides, in Section 19b, that when a discharge is granted pursuant to its terms, it shall be marked "AR 604-10 applies." The undesirable discharge certificate given to the petitioner contains such notation (J.A. 10).

Petitioner prays that the action of the respondent in discharging him from the Army with an undesirable discharge be declared null and void, and that respondent be directed to rescind the undesirable discharge and grant petitioner an honorable discharge.

There being no dispute as to the facts, both parties moved for summary judgment (J.A. 12, 16). The District Court granted summary judgment dismissing the complaint, holding that it had no authority to review the granting of a particular type of discharge (J.A. 22).

The Court of Appeals affirmed in a *per curiam* opinion (Appendix A hereto), feeling itself bound by *Harmon* v. *Brucker*, — F. 2d —. Certiorari has since been granted by this Court in the *Harmon* case.

This case differs from *Harmon* in a number of important respects: 1. Harmon received a general discharge under honorable conditions; petitioner received an undesirable discharge, with a notation that it was given under

the loyalty-security regulations of the Army. The injury to petitioner (see p. 8 ff. below) is therefore considerably more substantial than in *Harmon*. 2. Harmon's discharge was from the active service; petitioner was *honorably* separated from active service, but was discharged, with the certificate complained of, from the Reserves. 3. One of the "allegations" against Harmon, though a minor item, related to his conduct in the service; all of the allegations against petitioner related to pre-induction conduct.

Questions Presented

1. Does the District Court have jurisdiction to determine the contention of petitioner that his constitutional rights were violated and that the respondent exceeded his statutory powers when he gave petitioner an undesirable discharge from the United States Army Reserves based exclusively on allegations that the petitioner, prior to his induction, had engaged in certain lawful political activity?

2. Does Army Regulation 604-10, as applied to the petitioner, violate his rights under the First and Fifth Amendments to the Constitution and Article 1, Section 9 thereof, in that it purports to authorize the respondent to discharge the petitioner from the United States Army Reserves with an undesirable discharge based exclusively on allegations of the petitioner's lawful political activity engaged in prior to his induction in the Army and prior to the promulgation of AR 604-10 or any predecessor regulation?

3. Is Army Regulation 604-10 authorized by the Armed Forces Reserve Act of 1952 (Act of July 9, 1952, 50 U. S. C. 991, 992) or any other statute?

Reasons for Granting the Writ

1. The District Court in the instant case held that it lacked "authority to review" the conduct of defendant (J.A. 22). It does not appear that the Court gave any consideration to the constitutional and statutory issues raised by petitioner. The Court of Appeals wrote no opinion in this case, but in the controlling case of *Harmon* v. *Brucker*, — F. 2d —, it did consider the constitutional issues raised. It gave no consideration to the statutory issues, though Judge Bazelon urged that it should (p. 26, slip opinion in *Harmon*, submitted herewith). It then held that "the courts have no authority to take such action [to review a discharge]" (slip opinion, p. 13).

There is a constitutional right to judicial review of the acts of administrative officials who are alleged to have acted in a manner contrary to the Constitution of the United States (*St. Joseph Stockyards* v. *United States*, 298 U. S. 38, 52, 77; *Ng Fung Ho* v. *White*, 259 U. S. 276; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287) or in excess of statutory authority (*Stark* v. *Wickard*, 321 U. S. 288; *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369; *Fleming* v. *Moberly Milk Products Co.*, 160 F. 2d 259).

Constitutional issues aside, petitioner here raises questions as to the statutory authority for the respondent's action. See p. 15 ff. below.

The District Court must have jurisdiction to review the action of the respondent in the present proceeding, unless we are to reach the conclusion, inconsistent with our entire system of government, that the United States Army, unlike all other branches of the executive arm, can act without check by the courts and that the Constitution is unenforceable against it.

No such conclusion is permissible, and the courts have enforced the Constitution against the Army, as against other branches of the government. *Mitchell* v. *Harmony*, 13 How. 115; *Dynes* v. *Hoover*, 20 How. 65; *Burns* v. *Wilson*, 346 U. S. 137; *United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664; *Runkle* v. *United States*, 122 U. S. 543; *Shapiro* v. *United States*, 69 F. Supp. 205. The issue here is "wholly dependent upon a question of law." *United States* v. *Williams*, 278 U. S. 255, 257.

The specific issue of the power of a Court to review the type of discharge certificates issued to soldiers was considered but was left open by this Court in *Lamb* v. *Patterson*, 329 U. S. 539, although the Circuit Court of Appeals had, in that case, held that the issuance of a certificate of discharge was subject to judicial review if such conduct was arbitrary. *Lamb* v. *Patterson*, 154 F. 2d 319.

2. In the current political climate, a discharge from the Army marked, in substance, "Discharged under the Military Personnel Security Program" is enough to blight a man's life. Despite this, respondent urges that no injury has been done petitioner and that hence his constitutional rights cannot have been impaired.

This Court has recently noted that an employee excluded from public employment on loyalty charges bears a "badge of infamy." *Wieman* v. *Updegraff*, 344 U. S. 183, 191; *Peters* v. *Hobby*, 349 U. S. 331, 347. The disabilities from which he suffers are many; they have recently been noted by the Court of Appeals for the Second Circuit in *United States* v. *Ullmann*, 221 F. 2d 760, and by Mr. Justice Douglas in footnote 1 to his dissenting opinion in the same case, 350 U. S. 422, 440. We shall not elaborate, but shall

list in a footnote a few of the authorities illustrating the difficulties faced by one who bears such a stigma.[1]

The fact that petitioner has received an honorable separation from active service, and that his undesirable discharge was from the Reserves, does not alter this conclusion. The public infamy noted above applies to him in full force. Moreover, many statutes in New York State, where petitioner resides, limit benefits only to veterans with an honorable discharge from the United States Army and, hence, such benefits would not be available to petitioner.

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[1] PUBLIC EMPLOYMENT:
Kutcher v. *Gray*, 91 App. D. C. 266, 199 F. 2d 783; *Kutcher* v. *Higley*, 235 F. 2d 505; *Garner* v. *Board of Public Works*, 341 U. S. 716; *Adler* v. *Board of Education*, 342 U. S. 485.

PRIVATE EMPLOYMENT:
Parker v. *Lester*, 227 F. 2d 708, on remand, 141 F. Supp. 519, affirmed, 235 F. 2d 787; *In re Sperry Gyroscope Co.* v. *Engineers Assn.*, 279 App. Div. 630, affd. 304 N. Y. 582; *Fitzgerald* v. *Sperry Gyroscope Co.*, 283 App. Div. 1036; *Loews, Inc.* v. *Cole*, 185 F. 2d 641; *United Electrical, Radio & Machine* v. *General Electric*, 127 F. Supp. 934, affd. 231 F. 2d 259, cert. den. 352 U. S. —.

PASSPORTS:
Schachtman v. *Dulles*, 96 App. D. C. 287, 225 F. 2d 938; *Nathan* v. *Dulles*, 129 F. Supp. 951, app. dismissed, 96 App. D. C. 190, 225 F. 2d 29; *Boudin* v. *Dulles*, 136 F. Supp. 218, mod. 235 F. 2d 532.

DOCTORS:
Barsky v. *Board of Regents*, 347 U. S. 442.

LAWYERS:
Konigsberg v. *State Bar of Calif.*, U. S. S. C., Oct. Term, 1956, No. 5; *In re Anastaplo*, 3 Ill. 2d 471, 121 N. E. 2d 826, cert. den. 348 U. S. 946.

UNITED NATIONS EMPLOYMENT:
Executive Order 10459, 18 F. R. 3183.

Non-judicial comment on the situation is equally impressive. A few of the relevant writings on the subject may be found in: Brown

See § 21 of the Civil Service Law, relating to veteran's preference in Civil Service; § 608 (1) of the Education Law, relating to war service scholarships; §§ 168-176 of the Social Welfare Law relating to many benefits to veterans and members of the families of veterans; § 250 of the Military Law which provides that honorable discharges may be publicly recorded free of charge and § 32 of the General Business Law which provides for the issuance of licenses without payment of the customary license fee, to honorable discharged veterans and their widows.[2]

It is not only the possible loss of statutory benefits which adversely affects petitioner. The Army itself has elsewhere admitted that "nobody can question the fact that the person with the less than honorable discharge has curtailed future opportunity by virtue of that fact." Testi-

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and Fassett, "Security Tests for Maritime Workers", 62 Yale L. J. 1163; Gellhorn, "Security, Loyalty and Science" (1950); Newman, "Control of Information Relating to Atomic Energy", 56 Yale L. J. 769; Brown and Fassett, "Loyalty Tests for Admission to the Bar", 20 Univ. of Chicago Law Review 480; Comment, "Loyalty and Private Employment", 62 Yale L. J. 954; Comment, "Passport Refusals for Political Reasons", 61 Yale L. J. 171; Boudin, "The Constitutional Right to Travel", 56 Columbia Law Review 47; Bonticou, "The Federal Loyalty-Security Program" (1953); Jahoda and Cook, "Security Measures and Freedom of Thought", 61 Yale L. J. 295; Emerson and Helfeld, "Loyalty Among Government Employees", 58 Yale L. J. 1; Gellhorn, "Individual Freedom and Governmental Restraints", pp. 40-46, 131 ff. (1956); for an excellent survey of the situation, see Report of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York (1956).

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[2] It is not quite clear whether the federal statute giving Civil Service preference to veterans is limited to those who receive an honorable discharge from the Armed Forces or includes all of those who received an honorable separation from active service. The statute provides that preference shall be given to "those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States * * * and have separated therefrom under honorable conditions." (5 U. S. C. 851.)

mony of Jerome D. Fenton, Director of Industrial Personnel Security Review Program, Department of Defense, Nov. 23, 1955, before Sub-committee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 84th Congress, 2d Session, pursuant to S. Res. 94, p. 627. Mr. Fenton went on to say that the consequences of an adverse decision in a security case "are deep" and that he was troubled by them. Hearings, *supra*, p. 628.

AR 604-10 itself provides (§ 21) that when a soldier is given a discharge less than honorable, notice shall be given to the Director of the Federal Bureau of Investigation and the United States Civil Service. Petitioner is a student psychologist; most employment opportunities are likely to be in government service (J.A. 13).

An honorable discharge is a property right. *United States* v. *Keating*, 121 F. Supp. 477. To deprive petitioner of such right, especially with the "loyalty notation" affixed to his undesirable discharge, is dire punishment. The punishment is severe, for it destroys "the reputation of men and their right to work—things more precious than property itself." Mr. Justice Douglas, in *Peters* v. *Hobby*, *supra*, at 351. This grievous injury certainly cannot be inflicted frivolously or for insufficient reasons, or without the protection of our Constitution.

3. The regulation under consideration is invalid because: (a) it is unreasonable and arbitrary and, hence, in violation of the requirements of substantive due process under the Fifth Amendment to the Constitution; (b) it purports to give to the Army the authority to impose sanctions upon members of the Armed Forces for their lawful conduct as civilians and is, hence, in violation of the Fifth Amendment to the Constitution. Because the conduct in question related to the exercise of freedom of speech and association, it also violates the First Amendment; (c) it further violates the due process clause of the Constitution

as well as Article 1, Section 9, in that it operates retroactively so that alleged activities of petitioner, subject to no penalty at the time they took place, are made subject to a penalty by a regulation subsequently adopted; and (d) it is unconstitutionally vague.

a) The Army seeks to justify its conduct by arguing the need to maintain security in the Armed Forces. For present purposes, we assume that the Army has an absolute right to discharge any member of the Armed Forces for any reason which, in its unrestricted judgment, seems to be necessary for its best interests.[3]

But here the Army did not merely discharge petitioner. It attached to his discharge a badge of infamy, the consequences of which have already been described. The security of the Army is completely protected by granting discharges based on the character of service rendered. The granting of an undesirable discharge based upon the Army's evaluation of a soldier's pre-induction conduct is quite unrelated to any purpose the Army may have.

The familiar test of the substantive due process adequacy of an administrative regulation is: does the means chosen for the accomplishment of a generically permitted object bear a real and substantial relation to the accomplishment of the permitted object, or does it unreasonably interfere with personal rights? *Railroad Retirement Board* v. *Alton*, 295 U. S. 330; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79. Under this test the regulation, as applied here, is unreasonable in the substantive due process sense, for the end sought, namely, preservation of the

[3] We make this assumption for purposes of this case, and only because petitioner is not here suing for his right to be retained as a member of the Reserves if the respondent does not wish him to remain. As an original proposition, we might doubt whether the right of the Army, in a democratic society, can be as absolute as we have assumed.

security of the Armed Forces, cannot justify the injury inflicted on petitioner. The instant case involves personal rights and, hence, is entitled to extraordinary protection. *U. S.* v. *C. I. O.*, 335 U. S. 106, 141 (Rutledge, J., concurring); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115; *Thomas* v. *Collins*, 323 U. S. 516, 530.

b) The Army has on recent occasions unsuccessfully sought to try a civilian for offenses committed during prior military service. *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11. On a more famous occasion, it unsuccessfully sought to try a civilian for offenses committed in the course of a war. *Ex Parte Milligan*, 4 Wall. 2. The Navy has unsuccessfully sought to try a man in service for a crime committed during a previous term of service, an honorable discharge having intervened. *United States ex rel. Hirschberg* v. *Cooke*, 336 U. S. 210. But never before, so far as we know, has the military attempted to try a member of the Armed Forces for conduct prior to induction. Cf. *Kinsella* v. *Krueger*, 351 U. S. 470 and *Reid* v. *Covert*, 351 U. S. 487, reargument on both ordered November 5, 1956, 25 Law Week 3136.

Respondent denies that the discharge was given for pre-induction activities; rather, he says, it was given because petitioner was a security risk, the evidence thereof being his pre-induction activities. This is a mere play on words. Petitioner gave concrete demonstration of his loyalty and devotion by serving honorably under fire in Korea. The fact is that he is being punished for pre-induction conduct.

Serious question arises as to whether any governmental agency may impose penalties on anyone on the basis of the charges here alleged. *Wieman* v. *Updegraff*, 344 U. S. 183. Cf. *Schneiderman* v. *U. S.*, 320 U. S. 118. And see *Schware* v. *Board of Law Examiners*, October Term 1956, No. 92 and *Koenigsberg* v. *State Bar of California*, October Term 1956, No. 5, both decided May 6, 1957. Certainly no

such authority can be vested in the Army under the circumstances shown here. In *United States ex rel. Toth* v. *Quarles, supra*, this Court considered a situation which was, in part, a mirror-image of that presented here. There the Army sought to try a civilian for criminal conduct committed during service in the Army. Here the Army seeks to try a soldier for conduct (not even claimed to be criminal) committed prior to induction. The Army has no more jurisdiction over the offense in this case than it had over the person of the petitioner in the *Toth* case.

Further, the nature of the "allegations" here makes it clear that vital First Amendment issues are implicit in this record. The Army here is passing judgment on the basis of pre-induction political activity. The dangers to our constitutional structure raised by such a claim of power by the military are serious and quite unprecedented in our history.

c) Fair play "is the essence of due process." *Galvan* v. *Press*, 347 U. S. 522, 530. The regulation and its application to petitioner offend the most fundamental concepts of fair play. It imposes punishment retroactively for activities lawful at the time they were engaged in.

AR 604-10 was promulgated on June 29, 1955. Its predecessor regulation, SR 600-220-1, was promulgated on June 18, 1954. The conduct charged against the petitioner dates back to 1946.

Even if this regulation is otherwise valid it is an unconstitutional bill of attainder as applied to petitioner. *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277.

d) The regulation in many respects is unconstitutionally vague and, particularly, the criteria for determining whether an individual is a "security risk" (AR 604-10, Sec. 13b) do not even approach the standards required of constitutionally valid legislation.

Subdivisions (4), (7), (8), (9) and, by reference, (10), (11) and (12) of Sec. 13b all make use of the term "subversive" as a key word. The letter of allegations served upon appellant likewise makes constant use of that term. It is not defined by the regulation. It cannot imply advocacy of the overthrow of the United States Government by force or other illegal means (*Adler* v. *Board of Education*, 342 U. S. 485) since subdivisions (1), (2), (3) and (4) of Sec. 13b refer to such action. See the dissenting opinions in *U. S.* v. *Josephson*, 165 F. 2d 82, 94 and *Barsky* v. *U. S.*, 167 F. 2d 241, 260. In neither case did the majority pass on this issue.

Equally indefinite terms are scattered through the regulation. See Sec. 13b, subdivisions (2), (4) and (10) ("sympathetic association"), subdivision (8) ("infiltrated by members of subversive groups"), and elsewhere.

Finally, the basic standard applied by AR 604-10—"inconsistent with the interest of national security" (Sec. 1, 3, 12, et al.)—is inherently vague. It provides substantially no objective criterion on the basis of which a judgment can be made.

The regulations hence fail to meet this Court's standards with respect to the certainty required if due process is to be afforded. See *Connally* v. *General Construction Co.*, 269 U. S. 385; *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233; *Lanzetta* v. *N. J.*, 306 U. S. 451; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Winters* v. *New York*, 333 U. S. 507; *U. S.* v. *C. I. O.*, 335 U. S. 106.

4. Respondent claims that statutory authority for AR 604-10 and its predecessor SR 600-220-1 is to be found in the Armed Forces Reserve Act of 1952, 66 Stat. 495, 50 U. S. C. 991 and 992, set forth at pp. 2, 3, *supra*. The statute does not refer to the power of respondent to issue a discharge from the Reserves on the basis of charges of preinduction conduct.

The purpose of the Act of 1952 is set forth in the Senate Report on the Bill as follows:

> "The primary purpose of this bill is to bring together, to the greatest extent practicable, in one statute the great number of laws relating to the reserve components of the Army, Navy, Air Force, Marine Corps, and Coast Guard, which have been enacted during past decades."
>
> • • •
>
> "The second purpose of this bill is to enact, on a basis which is applicable to all of the Armed Forces uniformly, certain new provisions of law which have been shown to be necessary to correct existing defects in policies or practices relating to the Reserve and the individual members thereof.
>
> The impact of these new provisions of law will not be particularly significant because, with few exceptions, they merely enact into law policies which are now being carried out administratively." Senate Report No. 1795, United States Code Congressional and Administrative News, 82nd Congress, 2nd Session, p. 2005."

The report then goes on to summarize the "new provisions of law." The section under consideration was not listed. Evidently, therefore, Congress considered Section 992 to be merely a reenactment of the law then in effect.

Never since the establishment of the Republic has the Army sought to discharge anyone on the basis of charges of disapproved pre-induction conduct. To the extent to which non-exercise of a power may cast grave doubt on its existence, we have here almost two centuries of such non-exercise. " • • • [T]he want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *Federal Trade Commission* v. *Bunte Bros. Inc.*, 312 U. S. 349, 352. See also, *Mintz* v. *Baldwin*, 289 U. S. 346, 351; *Chapman* v. *El Paso Natural Gas Co.*, 204 F. 2d 46, 51.

There is here much more than mere non-exercise of a power; both the Army and the courts have long understood that the character of a discharge was intended only to reflect the character of Army service.

This Court, in *United States* v. *Kelly*, 15 Wall. 34, approved the opinion of the Judge Advocate General of the United States Army in holding that a discharge certificate "* * * was a formal final judgment passed by the Government upon the entire military record of the soldier, and an authoritative declaration by it * * *."

The Attorney General has likewise recognized this to be the character of a discharge. Almost 100 years ago he said:

> "* * * Regularly, an officer or soldier, upon his discharge from service, may be regarded as entitled to an honorable discharge, unless he is under sentence of dishonorable dismissal or unless he has been convicted of an infamous offense, and is sentenced to punishment therefor during the remainder of his term of service, or of conduct reflecting upon his military career, such as cowardice, etc., with either of which conditions an honorable discharge would be incompatible: * * *." 13 Op. Atty. Gen., 16, 18 (1869).

The Army itself has ruled that the character of service during a previous enlistment may not be considered in determining the nature of a discharge. In 1918 the Judge Advocate General of the Army said:

> "A soldier, who was dishonorably discharged in a previous enlistment, was inducted into the service during the late emergency and served honestly and faithfully. Under such circumstances he was entitled to an honorable discharge at the end of his present service. A bad record in a prior enlistment is immaterial in considering the character of the discharge to be granted from his present enlistment." Dig. Op., J. A. G. (1912-1930). Section 271, p. 128; Nov. 30, 1918.

Even absent constitutional questions, we should argue that only very specific language could create the very broad power here asserted. The fact that the asserted power by the respondent would raise difficult constitutional questions is even further reason for refusing to give to the statute quoted the scope claimed by the respondent.

5. The issue presented here is an important one and should be decided by this Court. It raises issues as to the authority of a civil court to pass upon the action of the military. Critical constitutional issues involving both First and Fifth Amendments are involved. And, most important, the future lives of several hundreds [4] of young men, many of whom served with honor and distinction in the Korean conflict, are at stake. They are entitled to the judgment of this Court on a matter so vital.

As is noted above (p. 5), there are factual differences between this case and *Harmon* which we feel justify the granting of a writ in this case. For purposes of present discussion, the principal difference between the two cases lies in the respective nature of the discharges granted to the two petitioners. Harmon received a general discharge without any notation that such discharge was pursuant to the Army security regulations. In opposing the writ, the principal argument by the respondent in the *Harmon* case was that, in fact, Harmon suffered no injury.

In the instant case the petitioner received an undesirable discharge with the "security risk" notation. The principal defense available to the respondent in the *Har-*

[4] In addition to *Harmon*, there are, or have been, perhaps a dozen other cases, raising similar issues, in various district courts. We would estimate that there are many scores of cases which have completed the administrative hearings within the Defense Department, or are still involved in those proceedings, in which no litigation was commenced. And, beyond doubt, there are many, many more who have not been able to undertake the expense and trouble of the extensive administrative processes involved.

mon case is therefore not available to the respondent in this case. Furthermore, the present case is much more typical of the several hundred similar cases affecting an equal number of young men, many of whom served with honor and distinction in the Korean conflict.

As an additional reason for granting a writ in this case it might be noted that Harmon and the petitioner are represented by different counsel and there is a considerable difference in the treatment of the issues in the two cases, as indicated by the petitions in the two cases. We feel, therefore, that the granting of a writ in this case will result in the most complete and satisfactory presentation of the issues to the Court.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, May 27, 1957

Respectfully submitted,

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
Attorneys for Petitioner,
25 Broad Street,
New York 4, N. Y.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13587

HOWARD D. ABRAMOWITZ, APPELLANT

v.

WILBER M. BRUCKER, Secretary of the Department of the Army, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

Decided April 26, 1957

Mr. Victor Rabinowitz, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court with whom *Mr. David Rein* was on the brief, for appellant.

Assistant Attorney General Doub, *Messrs. Oliver Gasch*, United States Attorney, *Paul A. Sweeney*, *Donald B. MacGuineas* and *Howard E. Shapiro*, Attorneys, Department of Justice, submitted on the brief for appellee.

Before BAZELON, FAHY and DANAHER, Circuit Judges.

PER CURIAM: We are agreed that *Harmon* v. *Brucker*, — U. S. App. D. C. —, — F. 2d — (1957), is controlling here. If the question were open, Judge Bazelon would reverse for the reasons stated in his dissent in *Harmon* and Judge Fahy would wish to consider the question anew.

Affirmed.

Appendix B

(Judgment)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,587—April Term, 1957

HOWARD D. ABRAMOWITZ,

Appellant,

v.

WILBER M. BRUCKER, Secretary of the Department of the Army,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

C. A. 2140—56
Filed April 26, 1957

Before:

BAZELON, FAHY and DANAHER,
Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel for appellant and submitted on the brief for appellee.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: April 26, 1957.

PER CURIAM.

Appendix C

ARMY REGULATION 604-10

Personnel Security Clearance.

Military Personnel Security Program

SECTION I

General

1. Purpose and scope. a. Purpose. These regulations prescribe the standard, criteria, and administrative procedures for the reporting, investigation, and disposition of military personnel in the Army Establishment; for the rejection of applicants for appointment or enlistment; and for the rejection of persons who would otherwise be inducted or involuntarily ordered into the Army when retention in or acceptance into the Army is inconsistent with the interests of national security. These regulations do not preclude trial by court-martial when such action is considered appropriate by commanders exercising court-martial jurisdiction. They do not preclude relief from active duty or discharge under other applicable regulations on grounds *other* than security. These regulations should not be used in those cases in which security is not the primary reason for initiation of action. Relief from active duty in lieu of action under these regulations is not authorized nor will action under these regulations be used as the *sole* basis for relief from active duty prior to the adjudication of a member's case.

b. Scope. These regulations apply to all military members of the Army Establishment including members of the National Guard of the United States on active duty and not on active duty and special categories of personnel covered in section VI. The Chief, National Guard Bureau will issue

appropriate implementing instructions governing the National Guard of the United States not on active duty.

* * *

3. Policy. a. The Department of the Army will assume, in the absence of evidence to the contrary, that the acceptance or retention of any officer, warrant officer, or enlisted man is clearly consistent with the interests of national security.

b. When it is established that retention of a member is *not clearly consistent* with the interests of national security, he will be discharged; except that an inductee normally will not be discharged as a security risk unless his retention is *inconsistent* with the interests of national security. (The standard for retention in service of an inductee is of necessity somewhat lower than the standard for other categories of personnel. Thus an inductee may be retained to perform his obligated service in a specially controlled duty under conditions which would require discharge of an officer or an enlistee. Also see par. 17b). In deciding upon the characterization of discharge in such cases, any doubt will be resolved in favor of the member and he will be discharged under honorable conditions. He will, unless otherwise prescribed in these regulations, be discharged with a discharge characterized no higher than "General, under Honorable Conditions."

* * *

SECTION II

Standard and Criteria

12. Standard. The standard for appointment, enlistment, voluntary call to active duty, or retention in a regular duty status within the Army Establishment will be that, based upon all the available information, it is determined that the appointment, enlistment, voluntary call to active duty, or retention in a regular duty status (par. 9) is

clearly consistent with the interests of national security. The standard for retention within the Army Establishment on definite assignment to specially controlled duties (par. 10) for inductees only will be that retention in such an assignment is *not inconsistent* with the interests of national security.

13. Criteria for application of standard. a. *Sensitive and non-sensitive positions.* * * *

b. *Criteria.* The ultimate determination of whether acceptance or retention within the Army Establishment of the person concerned is warranted must be an overall common-sense one based upon all available information. The activities and associations listed below, whether current or past, while not all inclusive, are of varying degrees of seriousness, and warrant initiation of action to effect such determination.

(1) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with or aiding or abetting another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(2) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with any espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of the Government of the United States by unconstitutional means.

(3) Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of the Government of the United States by unconstitutional means.

(4) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means (see SR 600-220-11). (An organization, movement, or group, officially designated by The Attorney General of the United States pursuant to Executive Order 10450, shall be presumed to be subversive until the contrary has been established.)

(5) Performing or attempting to perform his duties, or otherwise acting, to serve the interests of another government in preference to the interests of the United States.

(6) Failure or refusal to sign the loyalty certificate DD Form 98; pleading protection of the Fifth Amendment or of the Uniform Code of Military Justice, Article 31, in refusing to answer completely the questions contained in DD Form 98, DD Form 390, DD Form 398, or other related forms; pleading protection of the Fifth Amendment or of the Uniform Code of Military Justice, Article 31, or otherwise failing or refusing to answer any pertinent question propounded in the course of an official investigation, interrogation, or examination, conducted for the purpose of ascertaining the existence or extent, or both, of conduct of the nature described above and below.

(7) Participation in the activities of an organization as a front for an organization referred to

in (4) above, when his personal views were sympathetic to the subversive purpose of such organization.

(8) Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purpose.

(9) Participation in the activities of an organization referred to in (4) above, in a capacity where he should reasonably have had knowledge of the subversive aims or purposes of the organization.

(10) Sympathetic association with a member or members of any organization referred to in (4) above. (Ordinarily, this will not include chance or occasional meetings, or contacts limited to normal business or official relations.)

(11) Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to above. A close continuing association may be considered to exist if the individual lives at the same premises as, frequently visits, or frequently communicates with, such persons.

(12) Close continuing association of the type described in (11) above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

(13) Any facts other than as set forth in c below which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security. Among matters which should be considered in this category would be the presence of a spouse, parent, brother, sister,

or offspring in a nation, a satellite thereof, or an occupied area thereof, whose interests are inimical to the interests of the United States.

* * *

d. *Proscibed organizations.* A list of organizations designated by The Attorney General is set forth in SR 600-220-11. Membership, past or present, or affiliation or sympathetic association with an organization so designated is but one factor to be considered in making a determination in a particular case. In determining whether affiliation with a cited organization warrants further investigation, all facts bearing on the case must be considered including the date, term, and extent of affiliation, the age and circumstances of the individual at the time, the type of organization and its status at the time in question, and the military service and overall performance of duty of the individual concerned. Careful consideration of all these factors, particularly in the absence of any other derogatory information, may indicate that the initiation of a complaint type investigation is not warranted.

SECTION III

Administrative Procedures

* * *

d. No applicant will be appointed or enlisted without the specific approval of the Secretary of the Army if his separation from previous service indicates that he was relieved from active duty or discharged either as a security risk or for reasons other than security while undergoing investigation under the provisions of these regulations or of corresponding security regulations issued by the other military departments. AR 615-120 applies with respect to former members of the armed services seeking enlistment or reenlistment in the Army.

* * *

19. Type of discharge. a. Where the approved findings of the Army Review Board indicate that a member of the Army Establishment should not be retained under the standards and criteria prescribed in these regulations he will be discharged and the character of the discharge will, except as prescribed in paragraph 17, be predicated upon the gravity of the reasonably substantiated information in derogation. The general premise with respect to characterization of separation as set forth in paragraph 17b is applicable to all categories of personnel (par. 3b). Regular Army officers with over 3 years' service as such will be furnished a discharge authorized by section 106, Army and Air Force Vitalization and Retirement Act of 1948 (61 Stat. 1082; 10 U. S. C. 585).

b. The Report of Separation From the Armed Forces of the United States (DD Form 214) of members discharged under the provisions of these regulations will indicate in item 8: "AR 604-10 SPN 83." The letter of separation and/or discharge certificate of officer and enlisted reservists not on active duty will indicate: "AR 604-10 applies." Members relieved from active duty or discharged prior to completion of an action under these regulations will have "Paragraphs 9 and 20 (as appropriate), AR 615-120 applies" entered in item 38, DD Form 214.

* * *

21. Notification to other agencies. In accordance with SR 615-180-1, the Director, Federal Bureau of Investigation, the Chairman of the United States Civil Service Commission, and the appropriate local Selective Service Board will be furnished information of the identity of all persons rejected for induction for security reasons. The Assistant Chief of Staff, G-2, Department of the Army, will inform the Director, Federal Bureau of Investigation, the Chairman of the United States Civil Service Commission, and the Director, Selective Service System, of all persons denied appointment or enlistment or discharged from the military service as security risks.

* * *

SECTION V

Disposition of Cases

29. General. a. Upon receipt of a case with appropriate recommendation from the Assistant Chief of Staff, G-2, Department of the Army, The Adjutant General will—

* * *

(2) Refer all other cases to a Department of the Army Screening Board for review and recommendations.

* * *

31. Follow-up of Screening Board recommendations.

* * *

b. *Action to continue the case.* When the Screening Board recommends action other than to close the case, The Adjutant General will notify the appropriate staff activity and/or field command of action desired. If elimination action or indefinite assignment to specially controlled duties is recommended under these regulations, The Adjutant General will initiate action as indicated in c below.

c. *Letter of Allegations.* Upon receipt of a Screening Board recommendation to initiate elimination action or to indefinitely assign the member to specially controlled duties, The Adjutant General, based on information furnished by the Assistant Chief of Staff, G-2, Department of the Army, will, in conjunction with the Judge Advocate General, prepare a "Letter of Allegations." The "Letter of Allegations" will cite the derogatory allegations against the respondent in sufficient detail to enable him to prepare his defense and will be as complete as security considerations permit. The case together with the "Letter of Allegations" will be transmitted to the appropriate field command for dispatch of the letter to the respondent. Whenever practicable, the field commander will have the letter delivered in person to the respondent concerned and obtain receipt therefor. If personal delivery is not practicable

delivery will be by registered mail and a return receipt "addressee only" will be required. The following additional procedure will apply with respect to members of the National Guard not on active duty: The "Letter of Allegations" will be forwarded direct to the respondent by the Chief, National Guard Bureau (par. 6 applies); the Chief, National Guard Bureau, will forward a copy of the "Letter of Allegations" to the major commander concerned citing the date of dispatch to the respondent; the respondent will acknowledge receipt of the "Letter of Allegations" to the major commander concerned and will make his reply to the major commander concerned; The Adjutant General will forward the case direct to the major commander concerned. The "Letter of Allegations" will refer specifically to these regulations and will inform the respondent that—

(1) He may, in lieu of appearance before a board, rebut the letter in writing within 15 days of receipt and submit such documents as he may desire. Reasonable extension of time may be granted by the field commander.

(2) He may, within 5 days of receipt, request retirement, if eligible, or if an officer, he may tender his resignation, or if an enlisted man, he may request discharge in lieu of further proceedings. Enlisted men who are required to show cause why they should not be retained on specially controlled duties will not be permitted to submit a request for discharge. A member tendering his resignation or requesting discharge must agree to accept discharge of the character specified in the "Letter of Allegations." Final decision as to type of discharge to be awarded rests with the Department of the Army. A form letter to accomplish the tender or request will accompany each "Letter of Allegations" dispatched.

(3) He may, within 5 days of receipt, request a personal appearance hearing before a "field board"

with or without counsel, and if a reservist not on active duty, such appearance will be at his own expense. He will be furnished a military counsel and may select such counsel, if the individual selected is reasonably available. Civilian counsel, if desired, will be at his own expense. The Board will assist him in procuring witnesses who are reasonably available but he will not be entitled to reimbursement for expenses incurred incident to their appearance.

(4) He will elect in writing one of the choices offered in (1), (2), or (3) above. Should he refuse to elect one of the choices offered, he will be advised that his case will be processed to completion and adjudicated by the Department of the Army without any further referral to him. He will be advised also that such adjudication may result in an other than Honorable, General, or Undesirable Discharge.

d. *Follow-up of letter of allegations.* Upon receipt of the respondent's reply to the "Letter of Allegations" or upon expiration of 15 days following receipt of the letter by the respondent, whichever is sooner, the appropriate field commander will take action to refer the case to a field board of inquiry (if requested by the respondent) or to forward the case together with respondent's reply, if any (where appearance before a board of inquiry is not requested), to The Adjutant General with recommendation of action to be taken. The Adjutant General will refer the complete case together with recommendations of appropriate field commanders to the Army Review Board for final review in accordance with paragraph 33.

* * * *

33. Department of the Army Review Board. a. Upon receipt of a case with recommendations of the field board of inquiry and appropriate field commanders together with additional comments, if any, from the respondent, or upon

the expiration of 10 days plus normal mailing time to and from the respondent following his receipt of transcript of the "Field Board" actions, whichever is later, The Adjutant General will refer the case to the Army Review Board for final review and recommendation.

* * *

e. The Review Board will direct one of the actions indicated in paragraph 32c (7), to include the type of discharge when appropriate, except that when the Review Board decision is to discharge a Reserve officer on active duty or a Regular Army officer with less than 3 years' service as such, the Board will submit the case to the Secretary of the Army for final approval.

f. The decisions of the Review Board, and where applicable, of the Secretary of the Army, will be transmitted to The Adjutant General for necessary action.

* * *

35. Action following final review. The Adjutant General will notify the appropriate field commander of final action to be taken. In cases concerning members of the National Guard not on active duty, the Chief, National Guard Bureau, will be informed of such action.

* * *

c. If retention of the member is not warranted under the standards and criteria prescribed by these regulations The Adjutant General will direct the discharge of the member from any and all military statuses he may hold, including type of discharge to be furnished. Flagging action will be removed by the Department of the Army in accordance with AR 600-31.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13230

JOHN H. HARMON, III, APPELLANT

v.

WILBER M. BRUCKER, Individually and as Secretary of the Department of the Army, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided January 31, 1957

Mr. David I. Shapiro, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of Court, with whom *Mr. James H. Heller* was on the brief, for appellant.

Mr. Donald B. MacGuineas, Attorney, Department of Justice, with whom Assistant Attorney General *George Cochran Doub, Mr. Oliver Gasch,* United States Attorney, and *Messrs. Samuel D. Slade* and *Howard E. Shapiro,* Attorneys, Department of Justice, were on the brief, for appellee.

Before PRETTYMAN, BAZELON and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge:* John Henry Harmon, III, was inducted into the Army on October 31, 1952, under

the Universal Military Training and Service Act of 1948.[1] In May, 1953, some questions concerning membership in and relations with the Communist Party, and similar matters, were addressed to him by Army officials. He replied under oath, answering some questions and refusing to answer others on the ground of possible self-incrimination; his answers were reduced to writing and signed by him. In February, 1954, he was notified by the Adjutant General of the Army that he should reply to certain derogatory information which had been received concerning him. This derogatory information was itemized in seven specifications, "a" to "g". Items "a" through "d" and Item "g" concerned reported activities on Harmon's part, Item "e" activity on his father's part, and Item "f" activities on his stepmother's part. Harmon replied to the items concerning himself, but as to Items "e" and "f" he said: "It is with deepest moral indignity coupled with a devout sense of filial piety, that I refuse to answer the derogatory statements made under allegations e and f. As neither my father nor stepmother are employed in any capacity by the federal government, I am led to the conclusion that derogatory information concerning them is wholly irrelevant to the case at hand." Thereafter Harmon was informed that his discharge as disloyal or subversive under Army Regulation 615-370 had not been favorably considered and that he would be retained in the service in his then-present grade. Shortly thereafter the Secretary of Defense issued Directive 5210.9, the purpose of which was to apply to military personnel the security programs established by Executive Order 10450 in respect to civilian Government employees. It directed that the standard for retention within the armed services should be "that on all the available information it is determined that the * * * retention is clearly consistent with the interests of national security."

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[1] 62 STAT. 604, 50 U.S.C.A. App. § 451 *et seq.*

The directive was accompanied by a memorandum from the Secretary, directing that a review be made of all cases which had theretofore been cleared. Thereupon Harmon's case was reviewed, and the Army Personnel Board found that his further retention in the service was inconsistent with the interests of national security and recommended that he be discharged with an undesirable discharge. On June 2, 1954, he was discharged as undesirable. Harmon appealed to the Army Discharge Review Board to have the character of his discharge changed from undesirable to honorable. He was given a hearing, at which he appeared, and thereafter his application for a change was denied. He applied to the Army Board for the Correction of Military Records for the change in his discharge, and that application was denied. He then made a direct request to the Secretary for award of an honorable discharge, and this request was reviewed by an Assistant Secretary, who referred it to the Board for the Correction of Military Records. Harmon declined a hearing before that Board, stating that he had no additional facts to present. He took the position that the discharge certificate must accurately and adequately reflect the character of his military service and that, inasmuch as the character of this service, as set forth in his service record, was "excellent", he should receive an honorable discharge. The Board recommended against a change in the discharge, and the Assistant Secretary approved that recommendation.

Harmon filed a complaint in the District Court, praying that the action of the Secretary in discharging him with an undesirable discharge be declared null, void and illegal as in violation of the Constitution, the statutes, and Army regulations; and that his discharge be ordered changed from undesirable to honorable. On February 3, 1956, the District Court granted the Secretary's motion for summary judgment, on the ground that the court lacked authority to review, control or compel the granting of

particular types of discharge certificates to persons discharged from the Army.[2] Harmon appealed. Thereafter the Army Discharge Review Board, in the course of a general review of military personnel security cases, reviewed Harmon's case, and the character of his discharge was changed from undesirable to general under honorable conditions. He was thereupon issued a discharge certificate reading:

GENERAL DISCHARGE

Under Honorable Conditions
from the Armed Forces of the United States of America

This is to certify that
John Henry Harmon III US51 207 184 Private AUS
was Discharged from the

ARMY OF THE UNITED STATES
on the 2d day of June 1954 under honorable conditions

[Signed] R L Richstatter
R L RICHSTATTER
Captain Adjutant General's Corps

The Secretary suggested to this court that the case thus became moot. Harmon opposed the suggestion, upon the ground that the controversy was whether he should receive an honorable discharge. This court, on August 17, 1956, by order denied the Secretary's suggestion of mootness.

The alleged derogatory information concerning Harmon which was incorporated in Items "a", "b" and "c" of the initial notice of the Adjutant General concerned activities in 1951 and 1952 in a camp reported to be Communist-operated, employment in 1949 in an organization reported to be subversive, and registration in 1952 with the American Labor Party, cited by the House Committee as being

[2] Harmon v. Brucker, 137 F.Supp. 475 (1956).

under Communist control. All these alleged activities were prior to Harmon's induction into the Army. Item "d" was that Harmon "Solicited contributions of money for the defense of persons under indictment for violation of the Smith Act." Within a month after his induction into the Army Harmon wrote a letter to two friends, suggesting that they make a financial contribution to assist in the defense of two individuals who had been indicted under the Smith Act. Item "g" was that Harmon had been "Associated with persons who were Communists or Communist sympathizers." In response to this item Harmon said he was not then nor had he ever been a member of the Communist Party but that in the course of appearances before many groups and audiences it was quite possible that he had known or been acquainted with Communists or their sympathizers.

In respect to Harmon's military service the Secretary says that his (Harmon's) service record was marked "excellent" for the periods November 12, 1952, to July 24, 1953, and from August 2, 1953, to April 24, 1954, and that for the balance of his service his record was marked "unknown" as to character and efficiency.

As the case is now before us, the questions are (1) whether the court can declare null and void the action of the Secretary in discharging Harmon with a "General Discharge Under Honorable Conditions" and (2) whether the court can order the Secretary to change Harmon's discharge from "General Discharge Under Honorable Conditions" to "Honorable Discharge". We agree with the District Judge that the court cannot take either of such actions.

The nub of Harmon's contention on the first question is that he is entitled to judicial review of the Army's action. He does not contend that he could not be discharged; his complaint goes to the type of discharge given him. He was accorded all the procedural steps established by the Army regulations for the consideration and

determination of the propriety of discharges from the military service. As we have pointed out, he specifically told the Army authorities that he had no further facts to present. No statute was misapplied in the process or the substance of the discharge. No statute directs or authorizes judicial review of Army discharges. Indeed the statute provides that decisions of the Army boards shall be final.[3] Thus Harmon's argument must rest upon constitutional grounds: that as a matter of due process of law or by some other constitutional requirement he was entitled to court review of the type of discharge which he should be given.

The Constitution provides that the President shall be Commander in Chief of the Army and Navy of the United States[4] and that Congress shall have power to make rules for the government and regulation of the land and naval forces.[5] Title 10 of the United States Code clearly expresses a Congressional intent that the Army be administered solely by the executive branch of the Government.[6] The statute in effect at the time of Harmon's discharge provided[7] that "No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, *except in the manner prescribed by the Secretary of the Department of the Army*, or by sentence of a general or special

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[3] Act of June 22, 1944, 58 STAT. 286, as amended, 38 U.S.C.A. § 693h.

[4] Art. II, § 2, cl. 1.

[5] Art. I, § 8, cl. 14.

[6] 10 U.S.C. § 3012 (1956) [formerly 5 U.S.C.A. § 181—4, 64 STAT. 264 (1950).

[7] 41 STAT. 809 (1920), as amended, 10 U.S.C.A. § 652a (Supp. 1956) [now 10 U.S.C. § 3811 (1956)].

court-martial." (Emphasis ours.) Throughout our history the Articles of War and similar statutes have entrusted to the Secretary of War and his agents the granting of certificates of discharge.[8] The statute which authorized the Secretary to establish a board to review the types and natures of discharges specifically provided that the findings of such a board should be "final subject only to review by the Secretary of the Army".[9] The courts have held many times that they have no power to review the administrative processes by which the President and the Secretaries administer the affairs of the Army, and this doctrine has extended to the nature of discharges from the service.[10] On this subject we said in *Gentila* v.

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[8] WINTHROP, MILITARY LAW AND PRECEDENTS 547, 931, 933, 961, 972 (2d ed. 1920); Act of April 2, 1806, 2 STAT. 359, 361; REV. STAT. § 1342, Art. 4 (2d ed. 1878); Sec. 4(b), Selective Service Act of 1948, 62 STAT. 606, as amended, 50 U.S.C.A. App. § 454(b).

[9] *Supra* note 3.

[10] United States v. Eliason, 41 U.S. (16 Pet.) 291, 301-302, 10 L.Ed. 968 (1842); Reaves v. Ainsworth, 219 U.S. 296, 304, 306, 55 L.Ed. 225, 31 S.Ct. 230 (1911), *affirming* 28 App. D.C. 157 (D.C.Cir. 1906); Creary v. Weeks, 259 U.S. 336, 66 L.Ed. 973, 42 S.Ct. 509 (1922); French v. Weeks, 259 U.S. 336, 66 L.Ed. 965, 42 S.Ct. 505 (1922); Reid v. United States, 161 Fed. 469 (S.D.N.Y. 1908), *writ of error dismissed*, 211 U.S. 529, 53 L.Ed. 313, 29 S.Ct. 171 (1909); Davis v. Woodring, 72 App. D.C. 83, 111 F.2d 523 (D.C.Cir. 1940); Schustack v. Herren, 234 F.2d 134 (2d Cir. 1956); Nelson v. Peckham, 210 F.2d 574 (4th Cir. 1954); Bernstein v. Herren, 136 F.Supp. 493 (S.D.N.Y. 1955), 141 F.Supp. 78 (S.D.N.Y. 1956), *aff'd*, 234 F.2d 434 (2d Cir. 1956); Weeks v. United States, 51 App. D.C. 195, 277 Fed. 594 (D.C.Cir. 1922), *aff'd sub nom.* Creary v. Weeks, 259 U.S. 336, 66 L.Ed. 973, 42 S.Ct. 509 (1922); Marshall v. Wyman, 132 F.Supp. 169 (N.D.Cal. 1955); Nordmann v. Woodring, 28 F.Supp. 573 (W.D.Okla. 1939); McKenzie v. Kirkpatrick, 141 F.Supp. 49 (N.D.Cal. 1956).

Pace: [11]

> "We think Congress intended that the Board's [the Army Discharge Review Board's] full and 'final' review should not be subjected to a further review, or series of reviews, in the courts. We may suppose that Congress considered the heavy burden that would be imposed upon courts if they were required to review the findings upon which Army discharges are based. As the Supreme Court has said in regard to a type of dispute for which the Railway Labor Act provides, the 'intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.' Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 305, 64 S. Ct. 95, 99, 88 L. Ed. 61."

It is said that the foregoing statement was *dictum*. Whether that be so or not, we think the statement is correct. We adhere to it and adopt it for application here.

The import of the opinion of the Supreme Court in *Orloff* v. *Willoughby* [12] is the same as that of the opinions we have cited. There a physician inducted into the Army under the Doctors Draft Act [13] refused to state whether he was a member of the Communist Party. Because of this refusal he was not commissioned or given the duties of an Army doctor. He applied to a federal court for *habeas corpus* and for a discharge. He urged that it had been a uniform practice to commission Army doctors and, furthermore, that his induction under the Doctors Draft Act contemplated and required that he be given a commission. The Supreme Court held that the courts have no power to review such a matter, which fell within the

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[11] 90 U.S. App. D.C. 75, 77, 193 F.2d 924, 927 (1951), *cert. denied*, 342 U.S. 943, 96 L.Ed. 702, 72 S.Ct. 556 (1952).

[12] 345 U.S. 83, 97 L.Ed. 842, 73 S.Ct. 534 (1953).

[13] 64 STAT. 826 (1950), 50 U.S.C.A. App. § 454(i).

executive duties of the President and the Army. The Court observed:

> "We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service." [14]

Reason and the practicalities dictate the rule which we have found in the cases. Reason, flowing from the doctrine of the separation of powers, dictates that in many fields the administrative discretion of the executive branch and the legislative discretion of the legislative branch be not subject to interference or review by the courts. In no field is this doctrine more pertinent and important than in the operation of the armed forces. Provisions for the establishment and operation of such forces necessary to the security of this country are wholly legislative matters, and the administration of those forces is the very essence of executive action. The Constitution so provides. Only in the most extreme cases can the judiciary interfere in this area. As a practicality the operation of military forces requires expeditious, sometimes instant,

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[14] 345 U.S. at 93-94.

action and thus requires discipline. From the standpoint of the Army it is easy to see the disastrous effect upon discipline if the type of discharge which could be given an enlisted man were not within the power of his commanding officer or the Secretary, but were subject to litigation and to review and decision by a court wholly removed from the necessities of military affairs. As a further matter of practicality, from the standpoint of the courts review of such matters would impose an appalling burden, with which the courts are wholly unequipped to cope.

Harmon's insistence is that the type of discharge given him must be determined by the character of his military service and without regard to pre-induction events, activities, etc. But that is not our question. Our question is not what type of discharge he ought to be given; it is whether a court can review and determine the type of discharge. Harmon says a court can and must do so. To reach that conclusion a number of propositions are suggested.

The first such proposition concerns procedural due process. Harmon was given an opportunity to reply to the alleged derogatory information and was then issued a discharge. Thereafter he was given a hearing before the Army Discharge Review Board. He appealed that Board's adverse decision to the Army Board for the Correction of Military Records, again without success. Later, in connection with a direct appeal to the Secretary, he was offered a second hearing, which he declined. Harmon was thus given the full measure of procedural rights afforded by the Congress for persons in the military service. The Supreme Court held in *Reaves* v *Ainsworth*,[15] "Besides, what is due process of law must be determined by

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[15] 219 U.S. 296, 304, 55 L.Ed. 225, 31 S.Ct. 230 (1911). And see Burns v. Wilson, 346 U.S. 137, 97 L.Ed. 1508, 73 S.Ct. 1045 (1953).

circumstances. To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts."

Harmon urges that the Army violated Directive 5210.9 by failing to give him a hearing. He was notified on May 26, 1954, of his proposed discharge. The Directive provides "an opportunity upon request to present any cause why he should not be so separated." Harmon made no such request. Later, as we have pointed out, he was afforded a hearing before the Review Board. The requirements of procedural due process were fully met.

We find no question of substantive due process. The consideration of pre-induction activity was not frivolous, arbitrary or discriminatory; it was based upon reasonable grounds. Activity in the Communist movement involves participation in a conspiracy dangerous to our national security. Surely the Army cannot be compelled to retain a security risk in its service. Surely the President may apply to military personnel the same program and policies as to security and loyalty which he applies to civilian personnel in sensitive positions in the Government civilian service.[16] Harmon does not contend that he could not be separated from the service because of pre-induction conduct. If that be so, if he can be discharged as a security risk, the Army can determine whether he is or is not a security risk. And in that determination surely no data is more relevant and material than are his past habits, activities and associations. Such data is universally the material from which a determination of character or suitability is made, if indeed it is not the only material

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[16] See Cole v. Young, 351 U.S. 536, 100 L.Ed. 1396, 76 S.Ct. 861 (1956); *cf.* Jason v. Summerfield, 94 U.S. App. D.C. 197, 214 F.2d 273 (D.C.Cir. 1954), *cert. denied*, 348 U.S. 840, 99 L.Ed. 662, 75 S.Ct. 48 (1954).

from which it can be made. The Army, in making that determination, was not trying to find him guilty or not guilty of some act or offense. It was trying to determine his character as a security risk *vel non* and his consequent suitability for Army service. If it could make that determination, as admittedly it could, and upon that basis could determine whether a man was suitable for any service whatsoever, it could include that consideration among the factors to be considered in determining the value of his service and, consequently, in selecting the type of discharge to be given him. Moreover it is reasonable for Army authorities to believe that a security risk is not usable for many types of military service required of other soldiers, and that factor may well affect the value of the military service of such a person and, consequently, the type of discharge given him.

An honorable discharge from the Army is, as Harmon claims it is, a mark of distinction. The courts cannot dictate to the Army that it must give this mark to an enlisted man when it finds, on the basis of pre-induction activities, that his presence in the armed forces is not consistent with the national security.

It is suggested that a general discharge under honorable conditions imposes a "stigma" and so is punishment. Punishment, it is said, cannot be inflicted without judicial scrutiny. The Army can impose punishment, even the punishment of death, without judicial review.[17] Moreover the type of a discharge is not punishment in the sense that judicial process is required. No finding of guilt, no loss of liberty are involved. The penalty is the same as that which results from many unhappy experiences. Consideration of such "penalties" must begin in perspective. A discharge from civilian, commercial employment carries penalties in a real sense—stigma, loss of pay, dif-

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[17] Burns v. Wilson, 346 U.S. 137, 97 L.Ed. 1508, 73 S.Ct. 1045 (1953).

ficulty in subsequent employment; but no one would suggest that an employer cannot discharge an employee without judicial scrutiny. A civilian employee of the Government can be dismissed upon charges of a criminal offense without judicial review.[18] The courts do not interfere in such matters. When the same "penalties" arise from action of military authorities, they do not thereby become "punishment" necessitating judicial action.

Stigma attaches on rejection from military service as a security risk. Indeed, if one be rejected entirely, on account of being a security risk, the adverse effects are greater than upon receiving a General Discharge Under Honorable Conditions. Many benefits attach to status under the latter which do not attach to rejection. And the intangibles of stigma attach in either event. Nevertheless it certainly cannot be urged that the Army may not reject, without judicial review, as a security risk one registered for service.

It is suggested that an honorable discharge is of so great value that a man can be denied one only if he be afforded a right to judicial review. To hold to that effect would be to vitiate the whole discharge process provided by the Secretary.[19] The courts have no authority to take such action. They cannot arrogate to themselves supervisory authority over the Army. Apt on this point is another quotation from *Reaves* v. *Ainsworth*, *supra*. The Supreme Court said:

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[18] See, *e.g.*, Eberlein v. United States, 257 U.S. 82, 42 S.Ct. 12, 66 L.Ed. 140 (1921).

[19] On March 18, 1954, Robert T. Stevens, then Secretary of Defense, told the Senate Armed Services Committee: "When the evidence fails to show that he is disloyal, or is subversive, but does establish that he is otherwise a security risk and should be eliminated, he is separated under honorable conditions, usually with a general discharge." *Hearings on S. 3096*, 83d Cong., 2d Sess. 75.

> "The courts have no power to review. The courts are not the only instrumentalities of government. They cannot command or regulate the army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the army. • • • If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined."[20]

There is a margin of value of an "Honorable Discharge" over a "General Discharge Under Honorable Conditions". But a considerable measure of value is involved in a Government job, such as was involved in *Williams* v. *Cravens*,[21] and in the rights of a contractor, such as were involved in *Larson* v. *Domestic & Foreign Corp.*,[22] and in a public utility business, such as was involved in *Kansas City Power & Light Company* v. *McKay*.[23] Yet in all these instances the holders of the rights were deprived of them without court review.

It is suggested that the consideration of pre-induction happenings is in conflict with the traditional policies of the Army. Most certainly we cannot order the Army to

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[20] 219 U.S. at 306.

[21] 93 U.S. App. D.C. 380, 210 F.2d 874 (D.C.Cir. 1954), *cert. denied*, 348 U.S. 819, 99 L.Ed. 646, 75 S.Ct. 30 (1954).

[22] 337 U.S. 682, 93 L.Ed. 1628, 69 S.Ct. 1457 (1949).

[23] 96 U.S. App. D.C. 273, 225 F.2d 924 (D.C.Cir. 1955), *cert. denied*, 350 U.S. 884, 100 L.Ed. 780, 76 S.Ct. 137 (1955).

adhere to traditional practices. The armed forces in 1953-54 faced many new problems not involved in the operation of the military services of the 1770's, or the 1860's, or in 1917-18, or even in the early 1940's. Activity in the Communist movement now involves a possible conspiratorial participation dangerous to the security of this country. The efforts of this movement to infiltrate all parts of the Government pose new problems, which must be met with new rules and regulations.

Harmon argues that the pre-induction events considered by the Army were political opinions and so could not validly be considered under the First Amendment. Activity in the world Communist movement has long since passed the boundaries of mere political opinion. It may well make a man a security risk, and, as we have pointed out, the courts cannot compel the Army to retain in its service a security risk.

We come now to the second of Harmon's prayers, that the court direct the issuance to him of an honorable discharge. It is settled beyond question that the courts will not direct by *mandamus* any executive action which lies within the realm of executive discretion.[24] This is a rule of law quite apart from the peculiar insulation of Army affairs from judicial scrutiny. Harmon's prayer that the court direct the issuance to him of an honorable discharge is certainly a prayer for *mandamus*, and certainly the Congress has lodged within the area of executive discretion the selection of types of discharges to be given military personnel. So this prayer in Harmon's complaint does not lie within the jurisdiction of the court under the general rule applicable to all types of executive action. Even if such a prayer for mandatory direction ran

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[24] Anderson v. McKay, 94 U.S. App. D.C. 11, 211 F.2d 798 (D.C.Cir. 1954), *cert. denied*, 348 U.S. 836, 99 L.Ed. 660, 75 S.Ct. 51 (1954). See discussion and cases cited in Clackamas County, Ore. v. McKay, 94 U.S.App. D.C. 108, 219 F.2d 479 (D.C.Cir. 1954).

only to a civilian matter which had none of the elements of a military affair, the courts would have no authority in respect to it.

Affirmed.

BAZELON, *Circuit Judge*, dissenting: Appellant is a youth who was plucked out of civilian life and made a soldier, as are many others, at the threshold of the career he was planning for himself. Before the end of his term of service, he was restored to his civilian status, but hung about his neck was the millstone of "security risk." The Army has information about his civilian activities and associations on the basis of which it believes it would not be in the national interest to retain him as a soldier, but his military service is admitted to have been "excellent" and he is not claimed to have done anything illegal or reprehensible during his tour of duty. He does not challenge the discretion of the Secretary of the Army to judge whether the national security is served by dismissing a soldier. He complains only that, in the exercise of that discretion, there is neither necessity nor authority for inflicting upon him a gratuitous wound which may plague him all the rest of his days.

Appellant was inducted into the Army on October 31, 1952, as a draftee. On February 9, 1954, the Adjutant General of the Army informed him that the Army had received "derogatory" information about him and ordered him to reply thereto. He replied in writing on March 11, 1954. On April 2, 1954, the Adjutant General of the Army, acting by order of appellee, informed appellant that, upon review of the derogatory information and appellant's replies thereto, it had been determined that appellant would not be discharged under AR 615-370 as disloyal or subversive, but would be retained in his grade until completion of his service period, at which time he would receive a discharge "appropriate to the character

of service" he had rendered.[1] Five days later, the Secretary of Defense promulgated his Directive 5210.9, purporting to apply to military personnel the criteria of the civilian security program, Executive Order 10450 (April 27, 1953, 18 FED. REG. 2489), and to authorize dismissal of a soldier as a security risk if "on all the available information it is determined that [his] retention is [not] clearly consistent with the interests of national security." On May 26, 1954, the determination to let appellant complete his service was reversed and he was informed that he would be given an "undesirable" discharge under AR 615-370 prior to the expiration of his service period. On June 2, 1954, he received such a discharge.[2]

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[1] This comported with the traditional Army policy that the type of discharge be governed entirely by the service record, absent some disqualification covered by specific regulation. Thus, though a less than honorable discharge certificate can be given to a homosexual, a drug addict, a chronic alcoholic, a habitual shirker, a person with psychopathic personality, or a repeated petty offender (AR 635-208, formerly AR 615-368); to a deserter, a soldier who has entered the Army by fraud, or one who is convicted of crime in a civil court (AR 635-206, formerly AR 615-366); or to one who is "determined by investigation to be disloyal or subversive" (AR 615-370, as implemented by Special Regs. 600-220-1); where there is no such fault, an honorable discharge is called for if the soldier's conduct has been rated at not less than "good" and his efficiency at not less than "fair" (AR 635-200, par. 8). Former Secretary of the Army Stevens told a Senate Committee:

> The traditional policy of the Army has been that the discharge given should reflect the service rendered. In other words, a man whose conduct has been faithful and honest during the time in the service would be entitled to separation under honorable conditions, notwithstanding what his conduct may have been prior to entering the service. *Hearings, Senate Armed Services Committee on S. 3096*, 83d Cong., 2d Sess., March 18, 1954, at p. 75.

[2] Defense Directive 5210.9 provides that the separation re-

Appellant sought unsuccessfully to have his discharge changed to "honorable," first by appeal to the Army Discharge Review Board and then, in turn, to the Army Board of Correction of Military Records and the Secretary of the Army. Having exhausted all possible administrative remedies, he commenced this suit seeking a declaration that his undesirable discharge was void and an order that it be changed to an honorable discharge. Cross-motions for summary judgment were made. The District Court, concluding that it lacked jurisdiction of the cause, denied appellant's motion and entered summary judgment against him. This appeal followed.

The derogatory information the Army had about appellant was that he had been employed at what was "reported to be a Communist operated camp"; that he had been employed by the Detroit Urban League, "reported

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port of a soldier discharged as a security risk "will cite as authority the appropriate Armed Service directive under which separation is effected." Par. VIII-F-6. On June 2, 1954, when appellant was given his undesirable discharge, there was no specific Army directive dealing with security risks. AR 615-370, which was cited in the separation report as authority for the discharge, permits an undesirable discharge only upon a determination that the soldier is "disloyal or subversive." No such determination having been made regarding appellant, AR 615-370 was inapplicable. Indeed, appellee asserts that it was cited by mistake, the real basis for appellant's discharge being Directive 5210.9 itself.

By the time the Army Discharge Review Board reviewed appellant's discharge on April 11, 1956, and upgraded it to "General," the Army had already promulgated its specific "Personnel Security Clearance" regulations, AR 604-10, July 29, 1955. But those new regulations were not cited in the corrected separation report as authority for the action. The only additional authority cited for the new action was "Sec. 301, P.L. 346" which is merely the provision for review procedure. 58 STAT. 286 (1944), 38 U.S.C. § 693(h). Thus the only basis for appellant's discharge remains Defense Directive 5210.9.

to be a subversive organization"; that he had once "registered to vote in New York City with the American Labor Party . . . cited by the House Committee on Un-American Activities as being under Communist control . . ."; that he had solicited contributions for the defense of Smith Act prosecution defendants; that his father was reported to be a Communist and connected with various organizations cited as subversive by the Attorney General and to have registered many times with the American Labor Party; that his step-mother had registered with the American Labor Party for about ten years; and that he associated with Communists or Communist sympathizers.[3] In his written reply of March 11, 1954, appellant admitted summer employment by the camp as a kitchen-helper and assistant breakfast cook and by the Urban League as a counselor in its camp for under-privileged negro children. Concerning registration with the American Labor Party,

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[3] On May 7, 1953, the Army, without revealing this derogatory information to appellant, used it as the basis for interrogating him. On that occasion appellant denied that he was or had ever been a Communist or a member of any subversive organization, gave some details concerning persons about whom he was asked, described the circumstances under which he solicited funds for the defense of the Smith Act defendants, and gave sundry other information. With respect to a number of questions, appellant invoked his privilege under the Fifth Amendment and under Article 31 of the Uniform Code of Military Justice, 64 STAT. 118, 50 U.S.C. § 602, against self-incrimination. He later explained that he had invoked his privilege as a result of fear and apprehension growing out of the circumstances of the interrogation and the fact that he was without counsel. The questions as to which he had invoked the privilege were put to him again in the February 9, 1954, order and he answered all of them, except those relating to his parents. As to those, his refusal was based not on privilege, but rather on "moral indignity [*sic*]," "filial piety," and the assertion that they were irrelevant.

he had admitted it when first interrogated in May 1953,[4] and now added only that, since it was a legally recognized political party, he felt he could properly vote for it. Similarly, he had earlier admitted soliciting funds for the defense of two Smith Act indictees, and now merely added that he felt he had a right to do so. He denied that he was or had ever been a member of the Communist Party, but said that it was possible that he had known or been acquainted with Communists or sympathizers. The allegations concerning his parents he refused to reply to, as he had at his earlier interrogation. The District Court noted in its opinion that "Save for plaintiff's continuing association with his parents and for writing one letter requesting contribution for the legal defense of two persons indicted under the Smith Act, all charges against plaintiff were based on conduct antedating his induction into the Army."[5]

In his complaint, appellant alleged that his character and efficiency ratings had been "excellent." In his first answer, filed July 19, 1955, appellee admitted this allegation. On November 29, 1955, however, by amended answer, he pointed out that for about a week in July 1953 and for the period after April 24, 1954 (shortly before his discharge was ordered) appellant's rating was recorded as "unknown." But, under Army regulations, "ratings of 'unknown' and ratings for periods of less than two months are not 'disqualifying.'"[6]

Appellant also alleged that he was not and had never been a member of the Communist Party, or any Communist organization, or any organization advocating overthrow of the government or advocating or approving violence in denying others constitutional rights, or any or-

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[4] *Supra* note 3.

[5] *Harmon* v. *Brucker*, 137 F.Supp. 475, 476 (D.D.C. 1956).

[6] AR 615-360, par. 8b.

ganization seeking to alter our form of government by unconstitutional means, or any organization which, so far as he knew, had ever engaged in subversive activities. He also alleged that he was and always had been "completely and unswervingly loyal to the Government of the United States" and that he "would not hesitate to lay down his life in defense of the United States against any and all of its enemies whomsoever." Appellee denied these allegations, not on the ground that he believed them to be untrue but because of "lack of knowledge and information sufficient to form a belief" concerning them.

Appellee's first contention is that we should not even reach the question whether the District Court correctly declined jurisdiction. He informs us that, after this appeal was filed, the Adjutant General notified appellant that the character of his discharge had been upgraded from "undesirable" to "General (under honorable conditions)" and he asserts that there is, therefore, no longer a judicially cognizable case or controversy.[7] This new form of discharge, however, is not the legal equivalent of the honorable discharge which appellant sought.

It may well be, as appellee states, that none of the benefits available to discharged soldiers under federal law are withdrawn from the holder of such a "general" discharge as this. Many benefits are conferred, however, by the statutes of the State of New York, where appellant resides, and those statutes all use the language "honorable discharge" or "honorably discharged." Although the New York courts have not decided whether this excludes holders of a discharge entitled "General (under honorable conditions)," the late Judge Frank of the Court of Ap-

[7] The majority expresses no specific opinion as to this contention. It would seem, however, since the majority proceeds to deal with the question of the District Court's jurisdiction, that it rejected the contention that there is no longer a judicially cognizable case or controversy.

peals for the Second Circuit suggested that it would.[8] But whatever may be said of the technical legal equivalence or difference between the two types of discharge, from a real-life point of view they are vastly different. The portion of our population holding honorable discharge certificates from the armed services is now so great that an adverse reflection is inherent in a certificate which is other than "honorable."[9] This is, of course, confirmed by the statement of appellee's counsel in oral argument that "every soldier gets an honorable discharge unless there is some blemish on his record on account of which he receives a discharge other than honorable."

Nor is the new form of discharge defensible on the ground that the separation report does not on its face indicate that it was based on security considerations. The same observation could be made concerning the "undesirable" discharge. In both instances, however, a person

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[8] "Although a General Discharge (Under Honorable Conditions) apparently entitles a veteran to most, if not all, benefits under federal law, the statutes of New York, of which plaintiff is a resident, requires [*sic*] that a veteran have an Honorable Discharge in order to be eligible for various benefits under state law. See e.g. New York Military Law Sections 245, 250; New York General Municipal Law Section 148; New York Education Law Section 609; New York General Business Law Section 32." *Schustack* v. *Herren*, 234 F.2d 134, 135 n.2 (2d Cir. 1956).

[9] What the Supreme Court said in *Wieman* v. *Updegraff*, 344 U.S. 183, 190-91 (1952), concerning the discharge of an employee on disloyalty grounds is, we think, not inapplicable here:

> There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when "each man begins to eye his neighbor as a possible enemy."

sufficiently interested to check army regulations would discover the "security" character of the discharge. In the case of the "undesirable" discharge, the only reference to security was the citation of the "disloyal or subversive" regulation, AR 615-370, as the "Reason and Authority for Separation." The separation report accompanying the "General" discharge recited that "Para. 10, AR 615-120 applies." This regulation was cited, according to appellee, "to inform recruiting officers that appellant is ineligible for enlistment in the Regular Army." [10] As anyone may discover, this is a reference to AR 604-10, paragraph 15d, which provides:

> No applicant will be appointed or enlisted without the specific approval of the Secretary of the Army if his separation from previous service indicates that he was relieved from active duty or discharged either as a security risk or for reasons other than security while undergoing investigation under the provisions of these regulations or of corresponding security regulations issued by the other military departments. AR 615-120 applies with respect to former members of the armed services seeking enlistment or reenlistment in the Army.

See also Defense Department Directive 5210.9, par. II.

Our jurisdiction to entertain the appeal being unimpaired, the next question to consider is the District Court's ruling that, under our decision in *Gentila* v. *Pace*, 90 U.S.App.D.C. 75, 193 F.2d 924 (1951), it was "constrained" to disclaim jurisdiction of the cause.

"Stripped of self-contradiction and legal conclusions

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[10] Compare, in this connection, *Bailey* v. *Richardson*, 86 U.S.App.D.C. 248, 257-58, 182 F.2d 46, 55-56 (1950), *affirmed by an equally divided Court*, 341 U.S. 918 (1951), in which in sustaining the validity of the Government's civilian employee loyalty program, we pointed out that "mere dismissal from the Government service" is not punishment in the sense that permanent proscription from Government service had been held to be in *United States* v. *Lovett*, 328 U.S. 303, 316 (1946).

all that [Gentila's] complaint allege[d]" was that his dishonorable discharge for desertion rested upon "an erroneous finding of fact" that he was mentally capable of forming an intent to desert. We held that "merely erroneous findings of fact by the Discharge Review Board shall not be revised by a court." 90 U.S.App.D.C. at 77, 193 F.2d at 927. Although the District Court recognized that the instant case involved questions of law, it nevertheless thought *Gentila* controlling on the ground that both cases also involve "a review of the findings upon which the separation was based . . . ." *Harmon* v. *Brucker*, 137 F.Supp. 475, 477 (D.D.C. 1956). In this the District Court was wrong. The "findings upon which the separation [in the present case] was based" are not challenged at all. Indeed, as the majority opinion points out, appellant does not challenge the appellee's power to remove him from the Army on mere suspicion that he is a security risk.[11] But, whether or not the interests of national security justify dismissing a soldier on mere suspicion, appellant claims that those interests are not served by branding such a soldier as a security risk as he passes through the gate.[12] The issue he raises is one

[11] Cf. *Bailey* v. *Richardson*, *supra* note 10, 86 U.S.App.D.C. at 263, 182 F.2d at 61: "The Constitution does not require the President to continue to use in the training of Government personnel, the work performed by this appellant, a person whose loyalty to the Government he suspects. There is no reason in the Constitution why the President should not limit the training staff to persons whose loyalty is beyond the faintest shadow of suspicion."

[12] Even in the case of a civilian Government employee who sought the position he holds, rather than being drafted, although we said that "mere dismissal" is not punishment and that there is no redress for injury suffered "in the process of dismissal," we recognized no authority to inflict gratuitous injury over and above the dismissal. *Bailey* v. *Richardson*, *supra* note 10, 86 U.S.App.D.C. at 257-58, 265, 182 F.2d at 55-56, 63.

of law: whether appellee may withhold an honorable discharge from a soldier whose conduct and efficiency ratings have never been less than "excellent," even assuming the correctness of all of the information appellee relies upon. That claim being "wholly dependent upon a question of law," it is within the jurisdiction of the District Court. *United States* v. *Williams*, 278 U.S. 255, 257-58 (1929); NOTE, 70 HARV. L. REV. 533, 539-40 (1957). Nothing in *Gentila* v. *Pace*, *supra*, is to the contrary. Nor can I accept it as settled (either by this court or the Supreme Court) that courts may not in circumstances like these review the issuance of a less than honorable discharge. As was pointed out in *Schustack* v. *Herren*, 234 F.2d 134, 135 n. 1 (2d Cir. 1956), "The Supreme Court has not yet spoken on the question of whether and to what extent the courts have power to review or control the War Department's action in fixing the type of discharge certificates isued to soldiers [footnote omitted] . . . .' Patterson v. Lamb, 329 U.S. 539, 542, 67 S.Ct. 448, 449, 91 L.Ed. 485." In the footnote, the Supreme Court referred, among other authorities, to the decision of this court in *Denby* v. *Berry*, 51 App.D.C. 335, 279 Fed. 317 (1922), *reversed on other grounds*, 263 U.S. 29 (1923). In that case we held "void and without authority of law" what we thought to be a discharge which did not comport with statutory procedure.[13] See also *Davis* v. *Woodring*, 72 U.S.App.D.C. 83, 85, 111 F.2d 523, 525 (1940).

That appellant seeks, in addition to a declaration that the discharge given him was void, an order that he be given an honorable discharge does not, in my view, deprive the District Court of jurisdiction. If, upon review,

[13] Our decision was reversed by the Supreme Court upon the ground that what we considered a discharge was actually merely a transfer from active to inactive status, something wholly within the discretion of the commander-in-chief.

the discharge given appellant is declared to be void, we must assume that the Secretary would issue a discharge which is not void. *Denby* v. *Berry, supra.* Moreover, if the District Court finds the denial of an honorable discharge to rest on legally insufficient grounds, it may, at least, enjoin a denial for such reasons. *Perkins* v. *Elg,* 307 U.S. 325, 349-50 (1939); *Shachtman* v. *Dulles,* 96 U.S.App.D.C. 287, 294, 225 F.2d 938, 940 (1955).

Both parties request that we decide the merits of this controversy—namely, whether the Universal Military Training and Service Act of 1948, 62 STAT. 606, 50 U.S.C. App. § 454(b),[14] pursuant to which Directive 5210.9 was promulgated, authorizes issuance of less than an "honorable discharge" certificate, in the circumstances of this case. But I think that since the District Court never reached consideration of the merits, sound judicial practice requires that it should first have that opportunity.

---

[14] The statute sets the draftee's term of service at two years, "unless sooner released, transferred, or discharged in accordance with procedures prescribed by the Secretary of Defense . . . ."

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Supreme Court of the United States

October Term, 1957

No. 141

HOWARD D. ABRAMOWITZ,

Petitioner,

v.

WILLIAM M. BRUCKER,

Respondent.

BRIEF FOR PETITIONER

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Supreme Court of the United States

October Term, 1957

No. 141

HOWARD D. ABRAMOWITZ,

Petitioner,

v.

WILLIAM M. BRUCKER,

Respondent.

BRIEF FOR PETITIONER

Opinions Below

There was no opinion in the District Court. The order granting summary judgment dismissing the complaint appears in the Record at page 22. The Court of Appeals filed a *per curiam* memorandum which has not been reported (R. 23); it held that *Harmon* v. *Brucker*, 243 F. 2d 613 (C. A. D. C., 1957), was controlling. A writ of certiorari has been granted in the *Harmon* case and is now pending in this Court as No. 80, October Term, 1957.

Jurisdiction

The judgment of the Court of Appeals was entered on April 26, 1957. The writ of certiorari was granted on June 17, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions involved are the First and Fifth Amendments to the Constitution of the United States and Article I, Section 9 thereof.

The statutes [1] involved are:

a) The Act of May 5, 1950, c. 169, 64 Stat. 145, 10 U. S. C. 652a:

> "No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial."

b) Section 248 of the Armed Forces Reserve Act of 1952 (Act of July 9, 1952, 66 Stat. 481, 495, 50 U. S. C. 991):

> "Subject to the provisions of this chapter, the discharge of commissioned officers of the reserve components shall be effected at the pleasure of the President, and the discharge of other members of the reserve components shall be in accordance with regulations promulgated by the appropriate Secretary."

c) Section 249 of the Armed Forces Reserve Act of 1952 (66 Stat. 481, 495, 50 U. S. C. 992), which reads in relevant portion as follows:

> "(a) * * *
>
> (b) The President or the appropriate Secretary may drop from the rolls any member of the reserve components who has been absent without authority from his place of duty for a period of three months or

[1] All three statutes have since been recodified into Title 10 of the Code, by Act of August 10, 1956, c. 1041, § 53, 70A Stat. 641. See 10 U. S. C. §§ 3811, 8811 and 1162. The texts set forth are those in effect at the time this action was commenced. To avoid confusion, prior citations of other statutes now recodified into Title 10 will be given, and reference will also be made to the section of Title 10 into which they are presently codified.

more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a Federal or State penitentiary or correctional institution.

(c) A member of a reserve component discharged or separated for cause other than as specified in subsection (b) of this section shall be given a discharge under honorable conditions unless—

(1) a discharge under conditions other than honorable is effected pursuant to the approved sentence of a court-martial or the approved findings of a board of officers convened by competent authority, or

(2) the member consents to a discharge under conditions other than honorable with waiver of court-martial or board proceedings."

The regulation involved is Army Regulation 604-10, relevant portions of which are set forth in an appendix hereto.[18]

Questions Presented

1. Does the District Court have authority to review the contention of petitioner that the respondent exceeded his constitutional and statutory powers when he gave petitioner an undesirable discharge from the United States Army Reserves based exclusively on allegations that the petitioner, prior to his induction, had engaged in certain lawful political activity?

2. Does Army Regulation 604-10, as applied to the petitioner, violate his rights under the First and Fifth Amendments to the Constitution and Article 1, Section 9 thereof, in that it purports to authorize the respondent to discharge the petitioner from the United States Army Reserves with an undesirable discharge based exclusively on allegations respecting the petitioner's lawful political

[18] The regulation was not published in the Federal Register nor does it appear in the Code of Federal Regulations. Hence, no official citation is possible.

activity engaged in prior to his induction into the Army and prior to the promulgation of AR 604-10 or any predecessor regulation?

3. Is Army Regulation 604-10 on its face unconstitutional?

4. Is Army Regulation 604-10 authorized by the Armed Forces Reserve Act of 1952 (Act of July 9, 1952, 50 U. S. C. 991, 992) or any other statute?

Statement of Case

Petitioner is a citizen of the United States and a resident of the State of New York. On October 15, 1951, at the age of 21, he was inducted into the Armed Forces of the United States pursuant to the Universal Military Training and Service Act of 1951, 50 App. U. S. C. 451 *et seq.* He was engaged in active combat on the Korean front for a year and received a Korean Service Medal with three Service Stars and a United Nations Service Medal for service under fire (R. 2, 3, 12, 13).

Petitioner was released from active service on June 30, 1953, receiving an honorable separation from active duty. Pursuant to statute (50 App. U. S. C. 454) he was transferred to the Inactive Reserves (R. 3, 13).

Over two years later, on July 15, 1955, he received a communication from the Army (Complaint, Exhibit A). That communication stated that information had been received by the Army which furnished reason to believe that petitioner's retention in the Army "may not be clearly consistent with the interests of the national security." Petitioner was advised that he could request a hearing, submit a rebuttal in writing or elect discharge from the Reserves with the understanding that such discharge might be classified as "undesirable." The charges against petitioner were that during 1948 and 1949 he was a member of the Communist Party; that from 1949 to 1951 he was a member of the Labor Youth League; that from 1946 to

1948 he was a member of the American Youth for Democracy and that in 1950 he was a subscriber to the "Worker." The Communist Party, the Labor Youth League and American Youth for Democracy were all described as organizations cited by the Attorney General of the United States as subversive or as Communist (R. 3, 5-7).

Pursuant to the leave granted to him, petitioner submitted a letter of rebuttal on August 25, 1955, in which he pointed out that the letter of allegations related exclusively to his pre-induction political activities and asserted that the allegations did not constitute lawful and proper ground to deprive him of his status as a member of the United States Army or to discharge him under conditions other than honorable (R. 3, 8-10).

On September 30, 1955, petitioner received an undesirable discharge from the Armed Forces of the United States (Complaint, Exhibit E). Thereafter he filed successive applications for review of the discharge with the Army Discharge Review Board (pursuant to 38 U. S. C. 693h) and the Board for the Correction of Military Records (then 5 U. S. C. 191a; since recodified as 10 U. S. C. 1552). Both applications were denied. There are no further administrative remedies available to petitioner (R. 3, 11, 19, 21).

The regulation under which the Army proceeded initially was SR 600-220-1, superseded by Army Regulation 604-10 a few days after the original letter of allegations. For present purposes the old and new regulations are identical.[2] AR 604-10 sets up a series of loyalty criteria for service in the Army, patterned generally after the criteria prescribed for Government civilian personnel in Executive Order 10450, 18 Fed. Reg. 2489, with which this Court is familiar. *Cole* v. *Young*, 351 U. S. 536. Cf. *Peters* v. *Hobby*, 349 U. S. 331. AR 604-10 provides, in Section 19b, that when a discharge is granted pursuant to its terms,

[2] The genealogy of these regulations will be discussed *infra* at page 30.

it shall be marked "AR 604-10 applies." In accordance with that provision, the undesirable discharge granted to the petitioner contains such notation (R. 10).

Petitioner prays that the action of the respondent Secretary of the Army in discharging him from the Army with an undesirable discharge be declared null and void, and that the respondent be directed to rescind his undesirable discharge and grant him an honorable discharge (R. 4).

There being no dispute as to the facts, both parties moved for summary judgment (R. 12, 16). The District Court granted summary judgment dismissing the complaint, holding that it had no authority to review "the granting of particular types of discharge certificate." (R. 22)

Petitioner appealed and the Court of Appeals affirmed in a *per curiam* opinion, stating that it felt itself bound by its decision in *Harmon* v. *Brucker*, 243 F. 2d 613, certiorari granted May 13, 1957, presently pending as No. 80, October Term, 1957. One of the three members of the panel which heard this case expressed dissent from the *Harmon* case and a second expressed a "wish to consider the question anew." (R. 23)

Summary of Argument

I.

Petitioner has a constitutional right to judicial review of the acts of administrative officials who are alleged to have acted in a manner contrary to the Constitution. Even where there is no constitutional issue raised, the District Court has jurisdiction to review action by any administrative agency charged with having acted in excess of its statutory duty. The Army is no exception to this rule. The District Court has frequently reviewed administrative action by the Army and there is no reason why granting of a discharge should be immune from such review, especially when, as here, the regulation under which the Army proceeded violates petitioner's rights under both the First and Fifth Amendments to the Constitution, and, further, exceeds the statutory authority of respondent.

II.

An undesirable discharge issued pursuant to Army Regulation 604-10 results in severe injury to the petitioner. It imposes upon him the "badge of infamy" to which this Court referred in *Wieman* v. *Updegraff*, 344 U. S. 183, 191. It deprives him of statutory rights under the laws of the State of New York and of the United States. It so affects his reputation as to make it virtually impossible for him to secure public employment and most difficult, if not impossible, for him to secure private employment in his chosen occupation. This serious injury is more than sufficient to present a justiciable issue to the Court; it constitutes more than enough to establish a deprivation of property under the Fifth Amendment.

III.

Army Regulation 604-10 is unconstitutional because—

a) It authorizes the United States Army to impose punishment on the petitioner because of his pre-induction civilian conduct;

b) It is unreasonable and arbitrary, having no real relationship to the accomplishment of its alleged purpose, which is to safeguard the security of the Army. Even if the discharge of a soldier may be required for that purpose, the *nature* of the discharge given can have no relation at all to it.

c) It imposes punishment retroactively in that the charges alleged against petitioner relate to the period between 1948 and 1951. The conduct charged, lawful at all times, was not even the subject of regulation until 1954;

d) The regulation in terms is so vague that it offends the due process provision of the Constitution, especially in view of the fact that the area in which it operates affects, in a most intimate manner, the civil liberties of the petitioner.

IV.

There is no statutory authority for the issuance of an undesirable discharge to the petitioner. For almost a century, if not longer, it has been well recognized that the character of a discharge was intended to reflect the military service of a soldier and not his pre-induction or civilian conduct. There is no statute which, given a reasonable reading, can be said to have effected a change in this regard. Certainly, neither the Armed Forces Reserve Act of 1952, 50 U. S. C. 992, nor the Act of May 5, 1950, 10 U. S. C. 652a, upon which respondent relies, have that effect.

ARGUMENT

POINT I

The District Court had power to review the action of respondent in granting an undesirable discharge to petitioner.

The District Court in the instant case held that it lacked "authority to review" the conduct of respondent (J. A. 22). It does not appear that the Court gave any consideration to the constitutional and statutory issues raised by petitioner. The Court of Appeals wrote no opinion in this case, but in the companion case of *Harmon* v. *Brucker*, 243 F. 2d 613, it did consider the constitutional issues raised. It gave no consideration to the statutory issues, though Judge Bazelon, dissenting, urged that it should (243 F. 2d at 627). It held, at page 621, that "the courts have no authority to take such action [to review a discharge]".

There is a constitutional right to judicial review of the acts of administrative officials who are alleged to have acted in a manner contrary to the Constitution of the

United States (*St. Joseph Stockyards* v. *United States*, 298 U. S. 38, 52, 77; *Ng Fung Ho* v. *White*, 259 U. S. 276; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287) or in excess of statutory authority (*Stark* v. *Wickard*, 321 U. S. 288; *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369; *Fleming* v. *Moberly Milk Products Co.*, 160 F. 2d 259 [C. A. D. C., 1947]).

Constitutional issues aside, petitioner here raises questions as to the statutory authority for the respondent's action. See *infra*, p. 30.

The District Court must have jurisdiction to review the action of the respondent in the present proceeding, unless we are to reach the conclusion, inconsistent with our entire system of government, that the United States Army, unlike all other parts of the executive arm, can act without check by the courts and that the Constitution is unenforceable against it.

Of course, no such conclusion is permissible, and the courts have always exercised jurisdiction to review Army action. The superiority of civil government over the military has been fundamental to our system of government since the Declaration of Independence charged King George with having "affected to render the military independent of and superior to the civil power." Ten of the original thirteen colonies provided in their constitutions that the military should be subordinate to the civil government.[3] Only on the rarest occasions has the military attempted to

[3] Thorpe, Federal and State Constitutions, 538 (Connecticut); 570 (Delaware); 1688 (Maryland); 1892 (Massachusetts); 2456 (New Hampshire); 2788 (North Carolina); 3083 (Pennsylvania); 3222 (Rhode Island); 3257 (South Carolina); 3814 (Virginia). Many of the states subsequently admitted had similar provisions, *e.g.*, Thorpe, op. cit. 1275 (Kentucky); 1648 (Maine); 1931 (Michigan); 2034 (Mississippi); 3753 (Vermont).

assert that it was not subject to check by the civil courts, and even then such challenge has been unsuccessful. *Ex parte Milligan*, 4 Wall. 2. Not even the gravest national emergency can deprive the courts of their jurisdiction to protect the people of the United States against the invasion of their constitutional rights. *Youngstown Sheet & Tube* v. *Sawyer*, 343 U. S. 579. The Army is no exception to this general rule. *Ex parte Milligan, supra; Duncan* v. *Kahanamoku*, 327 U. S. 304; *Reid* v. *Covert*, 354 U. S. 1.

The courts have on many occasions enforced the Constitution against the Army, as against other branches of the government, and have even taken jurisdiction of claims against Army officers arising out of their conduct in the course of a military campaign. *Mitchell* v. *Harmony*, 13 How. 115. For at least one hundred years the courts have reviewed court-martial proceedings alleged to be illegal. *Dynes* v. *Hoover*, 20 How. 65. This is still true (*Gusik* v. *Schilder*, 340 U. S. 128), despite a statutory provision to the effect that court martial proceedings are not subject to review. 50 U. S. C. 663 (presently 10 U. S. C. 876).

The courts have taken jurisdiction over cases involving Army personnel in a variety of circumstances ranging from situations which have involved the very life of the citizen concerned (*Burns* v. *Wilson*, 346 U. S. 137) to cases which have involved the temporary loss of liberty (*United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664 [C. C. A. 3, 1944]) or, sometimes, only compensation. (*Runkle* v. *United States*, 122 U. S. 543; *Shapiro* v. *United States*, 69 F. Supp. 205 [Ct. of Cl., 1947]). In *Nelson* v. *Peckham*, 210 F. 2d 574 (C. A. 4, 1954) a court reviewed the action of the Army in refusing to give a soldier a commission, and directed that the soldier be released from service unless he was given a commission. In *Orloff* v. *Willoughby*, 345 U. S. 83, this Court assumed jurisdiction to decide whether the Army was complying with a Congressional mandate as to the character of the assignment given to an inductee.

It is true that this Court has never had occasion to review the character of a discharge certificate issued by the Army. The issue was raised in *Patterson* v. *Lamb*, 329 U. S. 539, but the Court found it unnecessary to reach the issue.[4]

Although the courts below evidently felt that they had no "authority" to review the Army's action here, even in the face of petitioner's contention that respondent had exceeded both his constitutional and statutory power, we do not understand that the respondent had ever seriously made such a contention. The respondent seems to confine himself to the proposition that a district court has no power to review the valid exercise of administrative discretion, manifested in this instance by the issuance of the discharge in question. (See, e.g., respondent's brief below, pp. 7-14).

This argument, quite different from that made by the courts below, begs the question before the Court. The whole issue before this Court is whether action by the respondent was a valid exercise of discretion. We are advanced not a bit by an argument based on an assumption that it is such a valid exercise. It is hence pointless to urge, as respondent did below, that a court may not "direct the exercise of judgment or discretion in a particular way." (See respondent's brief below, p. 13).

Every other government department is subject to judicial review when it is claimed to be acting in excess of its

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[4] The court below placed considerable reliance on *Gentila* v. *Pace*, 193 F. 2d 924 (C. A. D. C., 1951), cert. den. 342 U. S. 943. In that case the Court of Appeals held that a district court will not revise "merely erroneous findings of fact" by the Army (193 F. 2d at 927). Even that limited decision was made with some hesitation (see footnote 10 at p. 927). No statutory or constitutional issues were raised in the *Gentila* case.

constitutional or statutory authority.[5] "The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." *Stark* v. *Wickard*, *supra*, at 310. No reason appears for concluding that the Army is exempt from this general rule.

As a matter of fact, the exercise of judicial review is particularly appropriate and necessary here. This case is but one of many arising out of the "cold war" in its constitutional manifestations. The Court has many times in recent years found it necessary to review legislative, administrative and judicial proceedings to protect the constitutional rights of Americans. See, *e.g.*, *Wieman* v. *Updegraff*, 344 U. S. 183; *Peters* v. *Hobby*, 349 U. S. 331; *Watkins* v. *United States*, 354 U. S. 178; *Sweezy* v. *New Hampshire*, 354 U. S. 234, etc.

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[5] See *Youngstown Sheet & Tube* v. *Sawyer*, 343 U. S. 579 (granting review over the actions of the President of the United States); *Social Security Board* v. *Nierotko*, 327 U. S. 358 (Social Security Board); *Stark* v. *Wickard*, 321 U. S. 288 (The Secretary of Agriculture); *Fleming* v. *Moberly Milk Products Co.*, 160 F. 2d 259 (C. A. D. C., 1947) (Office of Price Administration); *Land* v. *Dollar*, 330 U. S. 731 (Maritime Commission); *Johnston* v. *U. S.*, 175 F. 2d 612 (C. A. 4, 1949) (National Recovery Administration); *The American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 (The Post Office Department); *Federal Radio Commission* v. *Nelson Bros. B. & M. Co.*, 289 U. S. 266 (Federal Radio Commission); *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (Federal Communications Commission); *Estep* v. *U. S.*, 327 U. S. 114 (Selective Service Administration); *Addison* v. *Holly Hill Fruit Products Inc.*, 322 U. S. 607 (Wage and Hour Administration); *Yonkers* v. *U. S.*, 320 U.S. 685 (Interstate Commerce Commission); *Ickes* v. *Fox*, 300 U. S. 82 (Secretary of the Interior).

POINT II

An undesirable discharge from the Reserves, issued pursuant to Army Regulation 604-10, constitutes punishment and results in severe injury to the petitioner.

This would indeed be that "blind" court against which we have been warned by Chief Justice Taft (in the *Child Labor Tax Case*, 259 U. S. 20, 37) and more recently by Mr. Justice Frankfurter (in *United States* v. *Rumely*, 345 U. S. 41, 44) if it were to hold that, in the current political climate, a discharge marked, in substance, "Discharged under the Army's Personnel Security Regulations" is not enough to blight a man's life. As Justice Taft said (p. 37): "All others can see and understand this. How can we properly shut our minds to it?" This Court has recently noted that an employee excluded from public employment for loyalty reasons bears a "badge of infamy." *Wieman* v. *Updegraff*, 344 U. S. 183, 191; *Peters* v. *Hobby*, 349 U. S. 331, 347. And at its last term, this Court noted that when witnesses are called by Congressional investigating committees and compelled to testify about unorthodox or unpopular beliefs, "the reaction in the life of the witness may be disastrous." *Watkins* v. *United States*, 354 U. S. 178, 197.

A soldier discharged from the Army with a discharge other than honorable, based on the Army's security regulations, suffers many specific disabilities. They have recently been noted by the Court of Appeals for the Second Circuit in *United States* v. *Ullmann*, 221 F. 2d 760, 761 (C. A. 2, 1955), and by Mr. Justice Douglas in footnote 1 to his dissenting opinion in the same case here, 350 U. S. 422, 440. And see the late Judge Frank in *Schustack* v. *Herren*, 234 F. 2d 134, 135 n. 2 (C. A. 2, 1956). Extensive further elaboration seems unnecessary; we shall list in a footnote

a few of the recent authorities discussing the difficulties faced by one who bears such a stigma.[6]

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[6] PUBLIC EMPLOYMENT:

Kutcher v. *Gray*, 199 F. 2d 783 (C. A. D. C. 1952); *Kutcher* v. *Higley*, 235 F. 2d 505 (C. A. D. C. 1956); *Garner* v. *Board of Public Works*, 341 U. S. 716; *Adler* v. *Board of Education*, 342 U. S. 485.

PRIVATE EMPLOYMENT:

Parker v. *Lester*, 227 F. 2d 708, on remand, 141 F. Supp. 519, affirmed, 235 F. 2d 787 (C. A. 9, 1956); *In re Sperry Gyroscope Co.* v. *Engineers Assn.*, 279 App. Div. 630, aff'd 304 N. Y. 582 (1952); *Fitzgerald* v. *Sperry Gyroscope Co.*, 283 App. Div. 1036 (First Department 1954); *Loews, Inc.* v. *Cole*, 185 F. 2d 641 (C. A. 9, 1950); *United Electrical, Radio & Machine* v. *General Electric*, 127 F. Supp. 934, a'd 231 F. 2d 259 (C. A. D. C., 1956), cert. den. 352 U. S. 872.

PASSPORTS:

Schachtman v. *Dulles*, 225 F. 2d 938 (C. A. D. C. 1955); *Nathan* v. *Dulles*, 129 F. Supp. 951 (D. C. D. C. 1955) app. dismissed, 225 F. 2d 29; *Boudin* v. *Dulles*, 136 F. Supp. 218, mod. 235 F. 2d 532 (C. A. D. C. 1956).

DOCTORS:

Barsky v. *Board of Regents*, 347 U. S. 442.

LAWYERS:

In re Anastaplo, 3 Ill. 2d 471, 121 N. E. 2d 826 (1954) cert. den. 348 U. S. 946

UNITED NATIONS EMPLOYMENT:

Executive Order 10459, 18 F. R. 3183.

Non-judicial comment on the situation is equally impressive. A few of the relevant writings on the subject may be found in: Brown and Fassett, "Security Tests for Maritime Workers", 62 Yale L. J. 1163; Gellhorn, "Security, Loyalty and Science" (1950); Newman, "Control of Information Relating to Atomic Energy", 56 Yale L. J. 769; Brown and Fassett, "Loyalty Tests for Admission to the Bar", 20 Univ. of Chi. L. Rev. 480; Comment, "Loyalty and Private Employment", 62 Yale L. J. 954; Comment, "Passport Refusals for Political Reasons", 61 Yale L. J. 171; Boudin, "The Constitutional Right to Travel", 56 Columbia L. Rev. 47; Bonticou, "The Federal Loyalty-Security Program" (1953); Jahoda and Cook, "Security Measures and Freedom of Thought", 61 Yale L. J. 295; Emerson and Helfeld, "Loyalty Among Government Employees", 58 Yale L. J. 1; Gellhorn, "Individual Freedom and Governmental Restraints", pp. 40-46, 131 ff. (1956); for an excellent survey of the situation, see Report of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York (1956).

The respondent argued below (see brief pp. 7, 17) that statutory benefits due to veterans, by and large, depend on the character of active service and that since petitioner has received an honorable separation from active service, he suffers no financial loss by virtue of the undesirable discharge he has received. To this there are several answers.

In the first place, it is not true that service benefits depend solely upon the character of a soldier's discharge from active service. In New York, where petitioner resides, many benefits are available only to veterans with an honorable discharge from the United States Army and hence would not be available to petitioner.

Probably the most important of these is Section 21 of the New York Civil Service Law which provides veterans' preference in civil service and which defines a veteran as "a member of the armed forces of the United States who served therein in time of war, who was honorably discharged or released under honorable circumstances from such service," the expression of "time of war" being further defined to include service in the Korean conflict. It will be noted that petitioner is a student psychologist; the preponderance of employment opportunities for him will be in state or municipal employment, so that the deprivation of veterans' preference rights is a very real and immediate injury to him (R. 13).

There are many other New York state statutes which limit substantial benefits to veterans with honorable discharges. Included are § 608(1) of the Education Law, which provides war service scholarships to veterans with honorable discharges; §§ 168-176 of the Social Welfare Law which provides many benefits to veterans and members of the families of veterans who have been honorably discharged; § 250 of the Military Law which provides that honorable discharges may be publicly recorded free of charge, and § 32 of the General Business Law, which pro-

vides for the issuance of licenses without payment of the customary license fee to honorably discharged veterans and their widows. See *Horylev* v. *New York State Bonus Commission*, 220 App. Div. 345 (3rd Dept. 1927).[7]

Indeed AR 604-10 itself provides that when a soldier is granted a discharge less than honorable, notice shall be given to the Director of the Federal Bureau of Investigation and the Department of the United States Civil Service Commission. AR 604-10, § 21, *infra*, p. 45. The reason for such notification is, of course, self-evident.

But loss of statutory benefits is the least of the penalties petitioner will suffer. The respondent himself and his subordinates have been much more realistic in dealing with this subject administratively than they are in dealing with it in litigation. It will be noticed that AR 604-10, § 31(c) (2) provides that when a soldier receives allegations reflecting upon his loyalty, he is given the right to tender his resignation, and that a "form letter to accomplish the tender * * * will accompany our letter of allegations dispatched." *Infra*, p. 48. And see the letter of allegations sent to petitioner (R. 7). The "form letter" does not appear in the record. The letter sent out to persons similarly situated reads as follows:

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[7] Even the Federal law with respect to veterans' benefits may deny some such benefits to persons whose status is similar to that of petitioner. For example, the Federal statute giving Civil Service preference to veterans provides that preference shall be given to "those ex-service men and women who have served on active duty in any branch of the Armed Forces of the United States * * * and have separated therefrom under honorable conditions." (5 U. S. C. 851).

.....
(Date)

.....
(Place)

SUBJECT: Application for Discharge in Lieu of Further Proceedings Under Army Regulations 604-10

To: Commanding General
.....Army

1. I, ..., ...
(Name) (Grade)
....., ..., hereby
(Service Number) (Component)
apply for discharge under *other than* honorable conditions, from my status as an enlisted member of the USAR.

2. The reason for the submission of this application is that proceedings have been initiated to determine whether I should be discharged under the provisions of Army Regulations 604-10.

3. I understand if this application is approved that I will receive an *undesirable* discharge.

4. I understand that I may be deprived of many rights as a veteran under both Federal and State legislation, and that I may expect to encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces or the character of discharge received therefrom may have a bearing.

.....
(Signature)

.....
(Permanent Home Address) [8]

[8] The Army regulations do not prescribe the form of letter although the form set forth in the text is the one customarily used. The corresponding Navy regulations, however, do set forth a pre-

The Defense Department has admitted elsewhere that "nobody can question the fact that the person with the less than honorable discharge has curtailed future opportunity by virtue of that fact." Jerome D. Fenton, Director of Industrial Personnel Security Review Program, Department of Defense, so testified on November 23, 1955, before the Sub-committee on Constitutional Rights of the Senate Committee on the Judiciary, 84th Congress, 2nd Session (hereinafter referred to as the Hennings Committee), p. 627. Mr. Fenton went on to say that the consequences of an adverse decision in a security case "are deep" and that he was troubled by them. Hearings, Hennings Committee, *supra*, p. 628.

The consequences of such undesirable discharges are indeed "deep" and it is not only Mr. Fenton who is troubled by them. The action of the Army here is but one aspect of the general loyalty program which has been a part of Government policy since 1947, and which has resulted in so much litigation in this Court and in the lower courts. Even more important than the effect of such program on our civil rights is its effect on our civilization. This is not the time for an extended dissertation on the "inhibiting effect in the flow of democratic expression" (*Sweezy* v. *New Hampshire*, 354 U. S. 234, 248) resulting from the widespread loyalty program. It has stifled free

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scribed form. SECNAVINST 5521.6, Annex 5. Like the Army regulations, the Navy regulations were never published in the Federal Register. The form set forth in the Navy regulations provides in paragraph 5 thereof:

> "I am also aware that if this application and agreement is accepted for the good of the Service, I may subsequently receive a certificate of undesirable discharge from the Service, and I may be deprived of rights and benefits as a veteran under both Federal and State legislation; and that I may expect to encounter substantial prejudice in civilian life in situations wherein the nature of service rendered in, or the separation of service from, the Armed Forces may have a part."

speech among all Americans, has terrorized the academic world, has forced young Americans into a pattern of political conformity, and has transformed our once bold and resourceful country into a nation of timid conformists whose greatest fear is that they will be considered politically unorthodox.[9]

The respondent does not really deny the serious consequences to the petitioner of the action taken by the Army here. He argued below rather that the injuries which befall petitioner under these circumstances are "not legal consequences of the discharge" (Brief below, p. 18). The Court of Appeals below, in the *Harmon* case, made similar argument, saying: "The penalty is the same as that which results from many unhappy experiences." 243 F. 2d at 620.

The answer to this was given by this Court in *Watkins* v. *United States*, 354 U. S. 178, when it said:

> "That this impact is partly the result of non-governmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction."

This is particularly true because the consequences of the Army's action are obvious and indeed are, in large part, intended.

Respondent denies that the discharge here was given for the lawful pre-induction political activities of the respondent. Rather he says it was given because petitioner was a security risk, the only evidence thereof being his lawful pre-induction political activities. This is a mere

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[9] A bibliography on this point would be extensive, the subject being one of the favorites of those who discuss the state of our civilization. This Court, of course, is fully aware of the problems raised and has been for many years. See, for example, the *Sweezy* case at pp. 250 and 261.

play upon words and cannot meet either the constitutional or the statutory objections posed by petitioner. When petitioner was called upon to serve his country in the Armed Forces, he did so honorably and well. He saw active service on the Korean battlefield. He received awards for that service and in due course received an honorable separation from service. Further, there is nothing in the record to suggest, and respondent does not assert, that petitioner's conduct while in the Inactive Reserves was such as to give rise to the suspicion that he might be a secu ty risk.[10a] The fact of the matter is that petitioner is being penalized for his conduct prior to induction and not for any other reason.

Secretary of Defense Charles E. Wilson, was quite frank about the procedure being followed here. He is quoted by the respondent as having said:

> "I don't believe you can give anyone a dishonorable discharge for something he did *before he was in the Services.* The best you can do is just get him back out again on some kind of basis that neither puts your stamp of approval on him or gives him a dishonorable discharge. I think it is sort of an intermediate position." (Respondent's brief below, p. 19; emphasis supplied.)

The "intermediate position" the Defense Department devised is the undesirable discharge here given to petitioner. As Secretary Wilson admits, the discharge was given "for something he did before he was in the Service."

[10a] This is not to suggest that the Army has the right to censor the political activities of those in the Inactive Reserves. This would extend Army control over civilian activities for six years after separation from active service.

POINT III

Regulation AR 604-10, under which petitioner was discharged, is unconstitutional.

The regulation under which the petitioner here is proceeding is invalid because:

a) It purports to give to the Army the authority to impose santions upon members of the Armed Forces for their lawful conduct as civilians;

b) It is unreasonable and arbitrary and hence, in violation of the requirements of substantive due process under the Fifth Amendment to the Constitution;

c) If further violates the due process clause of the Constitution, as well as Article I, Sec. 9 thereof, in that it operates retroactively, so that the alleged activities of petitioner, subject to no penalty at the time they took place, are made subject to severe penalty by a regulation subsequently adopted; and

d) The regulation is unconstitutionally vague.[10]

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[10] At least two lower courts which have considered the regulation on its merits, have disapproved of it. *Bernstein* v. *Herren*, 136 F. Supp. 493, 496-497 (D. C. S. D. N. Y., 1955); *Harmon* v. *Brucker*, 137 F. Supp. 475, 478 (D. C. D. C., 1956). In *Levin* v *Gillespie*, 121 F. Supp. 726 (N. D. Calif., 1954), a District Court held that, prior to the adoption of the present regulations, the Army could not give a soldier a discharge less than honorable because he had pleaded his privilege under the Fifth Amendment.

The Army itself, by its highest executive officials, has publicly recognized the inequity of its present regulations. For example, Secretary Wilson is quoted in the Washington Post for February 2, 1956, as affirming a new policy "that no one should be penalized for preinduction conduct". Despite this and other similar statements made at Congressional Committee hearings, corresponding changes in the regulation have not been made.

A. The regulation violates the Constitution in that it authorizes the Army to impose sanctions on the basis of the civilian conduct of the petitioner.

The Army has on recent occasions unsuccessfully sought to try a civilian for offenses committed during prior military service, *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11. On a more famous occasion it unsuccessfully sought to try a civilian for offenses committed in the course of a war. *Ex parte Milligan*, 4 Wall. 2. Cf. *Duncan* v. *Kahanamoku*, 327 U. S. 304. The Navy has unsuccessfully sought to try a man in service for a crime committed during a previous term of service, an honorable discharge having intervened. *United States ex rel. Hirschberg* v. *Cooke*, 336 U. S. 210. And most recently the Army has unsuccessfully attempted to try civilians accompanying the Armed Forces abroad for crimes committed against members of those Armed Forces. *Reid* v. *Covert*, 354 U. S. 1. Here the military seeks to impose sanctions on a member of the Armed Forces, after his honorable separation from active duty, for lawful conduct prior to induction.

Serious question arises as to whether any governmental agency may impose penalties on a citizen of the United States for the charges here alleged. This Court has held that mere membership in an organization on the Attorney General's list of subversive organizations may not serve as a disqualification from government employment. *Wieman* v. *Updegraff*, 344 U. S. 183. The Court of Appeals of the District of Columbia came to the same conclusion in *Kutcher* v. *Gray*, 199 F. 2d 783 (C. A. D. C. 1952), and held further, in *Schachtman* v. *Dulles*, 225 F. 2d 938 (C. A. D. C. 1955), that a citizen may not be denied a passport merely because he belonged to such an organization. And see *Schneiderman* v. *United States*, 320 U. S. 118. Indeed, the entire question of the validity of the Attorney General's list is very much in doubt. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Association of*

Lithuanian Workers v. *Brownell*, — F. 2d — (C. A. D. C. 1957), petition for certiorari pending in this Court, Oct. Term, 1957, No. 295. Cf. *Konigsberg* v. *California*, 353 U. S. 252 and *Schware* v. *Board of Bar Examiners*, 353 U. S. 232.

On the basis of the charges—that he was a member of three organizations on the Attorney General's list and that he subscribed to a specified newspaper—petitioner could not have been removed from Government employment nor could he have been denied a passport nor could he have been denied admission to the bar. *A fortiori*, he may not be publicly stamped as a security risk and given such a discharge by the Army as to result in substantial injury to him.

But even if a civilian agency were authorized to disqualify a citizen from receiving benefits available to others solely on the basis of his political association, certainly no such authority can be vested in the Army, under our constitutional structure.

In *United States ex rel. Toth* v. *Quarles*, *supra*, this Court considered a question which was in part the mirror image of that presented here. There the Army sought to try a civilian for criminal conduct committed during service in the Army. Here the Army seeks to punish a member of the Inactive Reserves for conduct (not even claimed to be criminal) occurring prior to induction. The Army has no more jurisdiction over the offense in this case than it had over the person of the petitioner in the *Toth* case.

"* * * [T]he business of soldiers is to fight and prepare to fight wars, not to try civilians for their alleged crimes" (*Reid* v. *Covert*, *supra*, p. 35). It certainly is not to impose sanctions on civilians for lawful political conduct. It has always been our proud boast that the "supremacy of the civil over the military is one of our great heritages." *Duncan* v. *Kahanamoku*, *supra*, concurring opinion of

Mr. Justice Murphy, at p. 325. Even the President, in his capacity as Commander-in-Chief, has powers strictly limited by the Constitution. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579.

This Court has on several occasions outlined in some detail the history both of this country and of England to illustrate "the deeply rooted and ancient opposition in this country to the extension of military control over civilians." *Reid* v. *Covert, supra*, p. 33. In addition to the *Reid* case at the last term, see *Ex parte Milligan, supra; Duncan* v. *Kahanamoku, supra; United States ex rel. Toth* v. *Quarles, supra.*[11]

We suggest that the learned court below was over-impressed with the argument that the Army is the best judge of its own security needs, and that in this area the opinion of a mere civilian, even that of a court, cannot stand against the expert opinion of the military. We think that exactly the contrary is the case. The charges against petitioner relate to the exercise of his constitutional rights. They are similar in nature to the kind of charge which forms the basis of much litigation both in this Court and in the lower federal courts. The agency of the Government which is least qualified to pass upon the exercise of these rights is the military. Army officers, well trained in concepts of discipline, living in an environment where strict conformity is not a vice but a necessary virtue, can hardly be expected to sympathize with the political heretics, the militant non-conformists, the social rebels necessary to the health of a free democratic society. Cf. *Sweezy* v. *New Hampshire, supra.*

"There has always been less emphasis in the military on protecting the rights of the individual than in civilian society and in civilian courts." *Reid* v. *Covert, supra*, p. 36. If this is true where simple penal offenses are concerned, how much more is it true where the issue involved is the exercise of First Amendment rights!

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[11] And see *supra*, p. 9, note 3.

It is difficult enough for trained civilians to pass upon these issues. There is every reason to believe that those trained in the business of waging and preparing for war are even less qualified to decide these matters.

B. The regulation is unreasonable and arbitrary and hence in violation of substantive due process.

The Army seeks to justify its conduct by arguing the need to maintain security in the Armed Forces. For present purposes, we can assume that the Army has an absolute right to discharge any member of the Armed Forces for any reason which, in its unrestricted judgment, seems to be necessary for its best interests.[12]

But here the Army did more than discharge petitioner; it attached to his discharge a badge of infamy, the consequences of which "may be disastrous." *Watkins* v. *United States*, *supra* at 197. The interest the Army has in preserving its security can be adequately protected by granting discharges based on the character of service rendered. The granting of undesirable discharges based upon the Army's evaluation of a soldier's pre-induction conduct is quite unrelated to any purpose the Army may have.

Even were this a case involving only property rights, the regulation and the action of the Army taken pursuant thereto would be unconstitutional. *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Nebbia* v. *New York*, 291 U. S. 502; *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410. But this case does not involve property rights; it involves personal rights and, moreover, those protected by the First Amendment.

Under such circumstances the action of any branch of the Government must be limited to "the least possible power adequate to the need proposed." *Anderson* v. *Dunn*,

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[12] We make this assumption for purposes of this case and only because petitioner is not here suing for his right to be retained as a member of the Reserves. As an original proposition, we doubt whether the rights of the Army, in a democratic society, can be as absolute as we have assumed.

6 Wheat. 204, 230-231; *Cantwell v. Connecticut*, 310 U. S. 296; *Schneider* v. *New Jersey*, 308 U. S. 147. For "the indispensable democratic freedoms secured by the First Amendment" occupy a "preferred place" in our constitutional scheme. *Thomas* v. *Collins*, 323 U. S. 516, 532.

The Army, of course, argues that this is an emergency, that the existence of the cold war justifies a measure of interference with our civil liberties.[13] "From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights." *Duncan* v. *Kahanamoku*, *supra*, concurring opinion of Mr. Justice Murphy, p. 330. A much greater emergency existed in *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*; yet the Court found the action of the President, taken in his capacity as Commander-in-Chief of the Army, to be unconstitutional.

The personal rights of the petitioner here are entitled to special protection. *United States* v. *CIO*, 335 U. S. 106, 141 (Rutledge, J. concurring); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115; *Thomas* v. *Collins*, *supra*; *Watkins* v. *United States*, *supra*, at 197, 198. Such protection was not afforded to the petitioner here.

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[13] The background out of which these regulations arose gives reason to conclude that the Army was not seeking protection from the petitioner but rather from Senator McCarthy. On January 30, 1954, Major Peress testified before the McCarthy Committee and invoked the Fifth Amendment as to certain questions. Three days later he received an honorable discharge from the Army. This precipitated a characteristic attack by Senator McCarthy on the Army, an attack which, as history shows, ultimately resulted in his downfall. Initially, however, the Army took prompt steps to appease the Senator and to stem the adverse publicity arising from the Peress case. On February 16, 1954, Secretary of the Army Stevens admitted that the Peress case showed defects in Army procedure in handling such cases and stated that an exhaustive investigation would be undertaken. On April 1, 1954, Secretary of Defense Wilson admitted that the Army had committed administrative error in handling the case. Six days later, Department of Defense Directive 5210.9 was issued and SR 600-220-1 was revised to conform therewith on June 18, 1954. Report of the Committee on Government Operations on Army Personnel Actions Relating to Irving Peress, Report No. 856, United States Senate, 84th Cong., 1st Sess.

C. Regulation 604-10 Imposes Punishment Retroactively.

Fair play "is the essence of due process." *Galvan* v. *Press*, 347 U. S. 522, 530. The regulation and its application to petitioner offend the most fundamental concepts of fair play. It imposes punishment retroactively for activities lawful at the time they were engaged in and not even the subject of regulation for years later. If this regulation is authorized by statute (see Point IV, p. 29, *infra*), it is an unconstitutional bill of attainder; if not, it is *a fortiori* unlawful.

The regulation in question was promulgated on June 29, 1955. Its predecessor regulation, SR 600-220-1, bears date of June 18, 1954. The conduct here charged against the petitioner goes back to 1946.

The several evils combined in bills of attainder are all present in this regulation. It inflicts harm on petitioner which will continue throughout his life, whenever he must present proof of his Army service. *Cummings* v. *Missouri*, 4 Wall. 277, 323. This punishment is inflicted without judicial trial because petitioner is allegedly a member of an ascertainable political group, and not because he committed any criminal act. *Calder* v. *Bull*, 3 Dall. 385, 388, 389. The proceeding assumes petitioner's guilt, and calls on him to establish his innocence, subverting the presumption of innocence customarily applied in criminal proceedings. *Cummings* v. *Missouri*, *supra*, at 328.[14]

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[14] The offense is compounded by the fact that, even after the regulation took effect, notice given to the public was insufficient. As we note above, AR 604-10 was not published in the Federal Register and does not appear in the Code of Federal Regulations, although the Army does publish other regulations respecting discharge of personnel because of hardship, minority and related reasons. 32 CFR § 582 *et seq.* The Air Force, alone of the three services, publishes its Regulations respecting security discharges. 32 CFR § 886.

The failure of the Army to publish the regulations would seem to be in violation of the Administrative Procedure Act, 5 U. S. C. 1001, 1002. *Hotch* v. *United States*, 212 F. 2d 280 (C. A. 9, 1954).

D. Regulation 604-10 Is Unconstitutionally Vague.

The regulation in many respects is unconstitutionally vague, particularly the criteria for determining whether an individual is a "security risk" (AR 604-10, § 13b).

Subdivisions (4), (7), (8), (9) and, by reference, (10), (11) and (12) of § 13b all make use of the term "subversive" as a key word. The letter of allegations served upon petitioner likewise makes constant use of that term. It is not defined by the regulation. It cannot imply advocacy of the overthrow of the United States Government by force or other illegal means (*Adler* v. *Board of Education*, 342 U. S. 485) since subdivisions (1), (2), (3) and (4) of § 13b refer to such action. Therefore, the term "subversive", both as used in the regulation and as used in the charges against appellant, must have some other meaning.

Obviously, unless the term is clearly defined, serious abuse must result from its loose use. Thus, the late Justice Jackson, when Attorney-General, accurately described the situation:

> "Activities which seem helpful or benevolent to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as 'subversive' by those whose property interests might be affected thereby. Those who are in office are apt to regard as 'subversive' the activities of any of those who would bring about a change of administration. Some of our soundest constitutional doctrines were once punished as 'subversive'." Quoted in Emerson and Helfeld, "Loyalty Among Government Employees", 58 Yale L. J. 1, 40.

The regulation contains no definition of the term "subversive"; and it is doubtful whether a definition could be drawn which would meet the requirements of the Constitution and also of those who administer the loyalty pro-

gram. The legislature of New Hampshire tried to define the term; the results appear in *Sweezy* v. *New Hampshire, supra*, at p. 246.

See also the dissenting opinions in *U. S.* v. *Josephson*, 165 F. 2d 82, 96 (C. A. 2, 1947), and *Barsky* v. *U. S.*, 167 F. 2d 241, 262 (C. A. D. C., 1948). In neither case did the majority pass on this issue. And in *Watkins*, p. 214, this Court found the terms "subversion and subversive propaganda" as broad and indefinite as "Un-American".

Equally indefinite terms are scattered through the regulation. See § 13b, subdivisions (2), (4) and (10) ("sympathetic association"); subdivision (2) ("revolutionist", "secret agent"); subdivision (7) ("a front for an organization which is totalitarian, fascist, communist or subversive or which has adopted or shows a policy of defecting or approving the commission of acts of force or violence"); subdivision (8) ("an organization • • • infiltrated by members of subversive groups"), etc.

This Court has but recently discussed the evils of this type of vague standard of conduct. *Watkins* v. *United States, supra* at pp. 201-206. The language limiting the authority of the House Committee on Un-American Activities, found by this Court to be unsatisfactory, is certainly no more vague than the amorphous and general standards set forth in AR 604-10. To compound the evil, § 13 (b) (4) defines as presumptively subversive any organization designated as such by the Attorney General pursuant to Executive Order 10450. The standards set up in said Executive Order are as indefinite as those prescribed in AR 604-10; indeed, in large part, the standards are identical.

This Court has many times discussed the necessity of precise language when private rights are at stake. *Connally* v. *General Construction Co.*, 269 U. S. 385; *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233; *Lanezita* v. *New Jersey*, 306 U. S. 451. The language used here is much more vague in its meaning than that found

insufficient in *Joseph Burstyn Inc.* v. *Wilson*, 343 U. S. 495 and *Winters* v. *New York*, 333 U. S. 507. Where the legislation in question seeks to curb constitutional rights, it must be particularly narrowly drawn "so that the person or persons affected remain secure and unrestrained in their rights to engage in activity not encompassed by the legislation." *United States* v. *CIO*, 335 U. S. 106, 142. Just as the vagueness in the statute creating the House Un-American Activities Committee put this Court "in an untenable position" in attempting "to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference" (*Watkins*, p. 205), so here the Court is in an equally untenable position in seeking to strike a balance between the Army's need for security and the citizen's right to engage in legitimate political activity.

POINT IV

There is no statutory authority for the issuance of an undesirable discharge to petitioner.

The ancestry of AR 604-10 is not difficult to trace. Executive Order 10450, promulgated on April 27, 1953, bears a close resemblance to the Regulation under consideration. Indeed, the criteria set forth in § 8 of that Executive Order parallel, and in many cases are identical with, the criteria set forth in § 13(b) of AR 604-10. The Executive Order, however, applied only to civilian personnel and it recites, as statutory authority for the order, several statutes which relate to civilians only.

Strictly speaking, the authority for the promulgation of security regulations in the Army must be found in Department of Defense Directive 5210.9 issued on April 7, 1954.[15] The criteria for loyalty are the familiar ones and are set forth in § VIII of the Directive. The Department of Defense Directive, however, contains no reference whatever to statutory authorization.

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[15] Like AR 604-10, this Directive was never published in the Federal Register.

A few weeks after Department of Defense Directive 5210.9 was issued, the Army issued its SR 600-220-1, which is the predecessor regulation to AR 604-10, and is for present purposes identical with it. The usual criteria for loyalty are repeated and again there is no reference to any statute which can be claimed to authorize such regulations.

We think respondent will agree that both AR 604-10 and SR 600-220-1 must find their statutory authority in either the Act of May 5, 1950, c. 169, 64 Stat. 145, 10 U. S. C. 652a or in the Armed Forces Reserve Act of 1952, 66 Stat. 481, 495, 50 U. S. C. 991, 992. At least we know of no other statute which might be applicable and the respondent has not referred to any.[16]

The relevant section of the Act of May 5, 1950, 10 U. S. C. 652a, reads as follows:

> "No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has

[16] In the hearings before the Hennings Committee, above referred to, Stephen S. Jackson, Assistant General Counsel in the office of the Secretary of Defense, was questioned at considerable length on the statutory authority for the Army's loyalty-security program. He admitted, at p. 488, that there was no "express" statutory authority for Department of Defense Directive 5210.9. After the hearing, at the request of the Committee, he submitted a letter attaching "copies of the pertinent statutes which authorize separation of military personnel" under the security program. Hearings, p. 492. The statutes referred to by Mr. Jackson were the two statutes referred to in the text and 10 U. S. C. 484a, 34 U. S. C. 405a, 10 U. S. C. 580 (Now 10 U. S. C. 3814, 8814; 10 U. S. C. 6392; 10 U. S. C. 3784, 8784) and 5 U. S. C. 22. The first three additional references relate only to officers and have no relevance whatsoever to the problem we are considering here. 5 U. S. C. 22 merely provides that the head of each department is authorized to prescribe regulations for the government of his department, the conduct of its officers and clerks, and the distribution and performance of its business. And see Hearings, pp. 601-603, in which a Defense Department representative testifies that he knows of no other authority.

expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial."

The relevant section of the Armed Forces Reserve Act of 1952, 50 U. S. C. 992, reads as follows:

"(a) • • •

"(b) The President or the appropriate Secretary may drop from the rolls any member of the reserve components who has been absent without authority from his place of duty for a period of three months or more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a Federal or State penitentiary or correctional institution.

"(c) A member of a reserve component discharged or separated for cause other than as specified in sub-section (b) of this section shall be given a discharge under honorable conditions unless—

"(1) a discharge under conditions other than honorable is effected pursuant to the approved sentence of a court-martial or the approved findings of a board of officers convened by competent authority, or

(2) the member consents to a discharge under conditions other than honorable with waiver of court-martial or board proceedings."

The question presented is whether either of these statutes, or both, give the respondent the power to issue a discharge from the Army based on pre-induction political activity. Neither statute refers to this matter specifically; if the respondent is to prevail, he must be able to read such authority into the statutes.

"There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged." *United States v. C. I. O.*, 335 U. S. 106, 112. Consideration of that law makes it abundantly clear that there is no statutory authority for the extraordinary power claimed by the respondent.

The applicable section of the Act of May 5, 1950, 10 U. S. C. 652a, has a history even longer than that of our Constitution. Its equivalent appeared in the Articles of War as enacted by the Continental Congress in 1776. See 2 Winthrop, Military Law and Precedents, pp. 844, 1490 (2nd Ed., 1896). It appears as Article 108 of the Articles of War enacted on June 4, 1920, c. 227, subchapter II, 41 Stat. 787, 809. When in 1950, the Articles of War were revised and became the Uniform Code of Military Justice (Act of May 5, 1950, c. 169, 64 Stat. 108; codified at 50 U. S. C. 551 *et seq.*), this section was reenacted and codified in Title 10 of the Code, at Sec. 652a (since recodified as 10 U. S. C. 3811. See p. 2, n. 1, *supra*). The Senate Committee report on the bill specifically stated that Congress intended only a reenactment of preceding law. Senate Rep. 486, June 10, 1949, U. S. Code Congressional Service, 81st Congress, 2nd Session, pp. 2222, 2261.

In 180 years of experience under this section of the law, the Army had never, prior to 1954, sought to discharge for preinduction activity. To the extent to which non-exercise of a power may cast grave doubt on its existence, we have here almost two centuries of such non-exercise. "* * * [T]he want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *Federal Trade Commission* v. *Bunte Bros. Inc.*, 312 U. S. 349, 352. See also *Mintz* v. *Baldwin*, 289 U. S. 346, 351; *Chapman* v. *El Paso Natural Gas Co.*, 204 F. 2d 46, 51 (C. A. D. C., 1953).

There is here much more than mere non-exercise of a power; it is clear that both the Army and the Courts have long understood that the character of a discharge was intended only to reflect the character of Army service.[17]

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[17] The Report of the Commission on Government Security urges strongly that the type of discharge should depend only on military service. The discharge certificate, the Commission recommended, should not become "an appraisal of a standard of conduct unrelated to the performance of the person's military duties." See Report, pp. 145, 147.

The Supreme Court, in *United States* v. *Kelly*, 15 Wall. 34, approved the opinion of the Judge Advocate General of the United States Army in holding that a discharge certificate " * * * was a formal final judgment passed by the Government upon the entire military record of the soldier, and an authoritative declaration by it * * *."

The Attorney General has likewise recognized this to be the character of a discharge. Almost 90 years ago he said:

> " * * * Regularly, an officer or soldier, upon his discharge from service, may be regarded as entitled to an honorable discharge, unless he is under sentence of dishonorable dismissal, or unless he has been convicted of an infamous offense, and is sentenced to punishment therefor during the remainder of his term of service, or of conduct reflecting upon his military career, such as cowardice, etc., with either of which conditions an honorable discharge would be incompatible; * * * " 13 Op. Atty. Gen. 16, 18 (1869).

The nature of the discharge granted by the Army is so closely determined by the character of the service rendered that the Army itself has ruled that the character of service during a previous enlistment may not be considered in determining the nature of a discharge. In 1918 the Judge Advocate General of the Army said:

> "A soldier, who was dishonorably discharged in a previous enlistment, was inducted into the service during the late emergency and served honestly and faithfully. Under such circumstances he was entitled to an honorable discharge at the end of his present service. A bad record in a prior enlistment is immaterial in considering the character of the discharge to be granted from his present enlistment." Dig. Op., J. A. G. (1912-1930). Section 271, p. 128, Nov. 30, 1918.

The Armed Forces Reserve Act of 1952 adds nothing to the general picture. The purpose of the Act was clearly set forth in the Senate report on the bill as follows:

"The primary purpose of this bill is to bring together, to the greatest extent practicable, in one statute the great number of laws relating to the reserve components of the Army, Navy, Air Force, Marine Corps, and Coast Guard, which have been enacted during past decades."

* * *

"The second purpose of this bill is to enact, on a basis which is applicable to all of the Armed Forces uniformly, certain new provisions of law which have been shown to be necessary to correct existing defects in policies or practices relating to the Reserve and the individual members thereof.

"The impact of these new provisions of law will not be particularly significant because, with few exceptions, they merely enact into law policies which are now being carried out administratively." Senate Report No. 1795, United States Code Congressional and Administrative News, 82nd Congress, 2nd Session, p. 2005.

The report then goes on to summarize the "new provisions of law". The section under consideration was not listed. Evidently, therefore, Congress considered Section 992 to be merely a reenactment of the law then in effect.

The court below, in *Harmon*, at p. 621, notes that it cannot order the Army "to adhere to traditional practices." The mere fact, however, that the Army has the right to change its practices does not authorize it to act without statutory authority. The issues here are not trivial. They affect the exercise of civil rights by a very substantial portion of the population. Without statutory authority, the Army cannot claim the right to impose political censorship upon the civilian conduct of millions of young Americans of pre-induction age, most of whom are also of University age. *Cf. Sweezy v. New Hampshire*, 354 U. S. 234, 250. We can conceive of no measure better calculated to destroy our democracy.

Even absent constitutional questions, we should argue that under the circumstances much more specific language is required than is found here. The fact that the asserted power by the respondent would raise difficult constitutional questions is even further reason for refusing to give to the statutes quoted the scope claimed by the Army. It does violence to the most elementary principles of statutory construction to attempt to graft such vast powers, of doubtful constitutionality, upon the very general language relied on by the respondents in this case. *United States* v. *Rumely*, 345 U. S. 41; *United States* v. *Delaware and Hudson Co.*, 213 U. S. 366, 407.

CONCLUSION

The judgments below should be reversed, and summary judgment entered in favor of petitioner, directing that respondent issue an honorable discharge to petitioner.

September 19, 1957.

Respectfully submitted,

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APPENDIX

ARMY REGULATION 604-10

Personnel Security Clearance

Military Personnel Security Program

SECTION I

General

1. Purpose and scope. a. Purpose. These regulations prescribe th standard, criteria, and administrative procedures for the reporting, investigation, and disposition of military personnel in the Army Establishment; for the rejection of applicants for appointment or enlistment; and for he rejection of persons who would otherwise be inducted or involuntarily ordered into the Army when retention in or acceptance into the Army is inconsistent with the interests of national security. These regulations do not preclude trial by court-martial when such action is considered appropriate by commanders exercising court-martial jurisdiction. They do not preclude relief from active duty or discharge under other applicable regulations on grounds *other* than security. These regulations should not be used in those cases in which security is not the primary reason for initiation of action. Relief from active duty in lieu of actio nunder these regulations is not authorized nor will action under these regulations be used as the *sole* basis for relief from active duty prior to the adjudi cation of a member's case.

b. Scope. These regulations appiy to all military members of the Army Establishment including members of the National Guard of the United States on active duty and not on active duty and special categories of personnel covered in section VI. The Chief, National Guard Bureau

will issue appropriate implementing instructions governing the National Guard of the United States not on active duty.

2. Definitions. For the purpose of these regulations, the following definitions apply:

• • •

c. Credible derogatory information. Credible derogatory information means information received from any source, which evaluated in the light of all other available information, both favorable and unfavorable, indicates that retention ~~within~~ the Army Establishment of the member concerned may not be, or is not, warranted under the standards and criteria prescribed by these regulations. Examples of information which may be used as a basis for flagging action are contained in paragraph 13.

f. Known communist. A known communist is any person who claims to be a current member of the Communist Party and or any person against whom credible derogatory information exists establishing such current membership.

• • •

3. Policy. a. The Department of the Army will assume, in the absence of evidence to the contrary, that the acceptance or retention of any officer, warrant officer, or enlisted man is clearly consistent with the interests of national security.

b. When it is established that retention of a member is *not clearly consistent* with the interests of national security, he will be discharged; except that an inductee normally will not be discharged as a security risk unless his retention is *inconsistent* with the interests of national security. (The standard for retention in service of an inductee is of necessity somewhat lower than the standard for other categories of personnel. Thus an inductee may be retained to perform his obligated service in a specially controlled duty under conditions which would require dis-

charge of an officer or an enlistee. Also see par. 17b.) In deciding upon the characterization of discharge in such cases, any doubt will be resolved in favor of the member and he will be discharged under honorable conditions. He will, unless otherwise prescribed in these regulations, be discharged with a discharge characterized no higher than "General, under Honorable Conditions."

• • •

5. Utilization of investigative reports. Investigations by agencies of the Army Establishment will develop all relevant facts in favor of, as well as against, an investigated person, with special emphasis being given to that information which supports or refutes an allegation stemming from the criteria hereinafter described. Whenever possible, information will be so presented that its disclosure is not precluded in the interests of national security. In this connection the provisions of paragraph 45f, SR 380-320-10 apply. However, for those informants whose identities are not disclosed, sufficient information will be reported to permit adequate evaluation of the information furnished by them.

6. Control of investigative information. Reports and other investigative material and information developed by investigations conducted pursuant to regulations in implementation of the Army security program will remain the property of the investigative agencies conducting the investigation. Such reports and other investigative material and information will be maintained in confidence, and no access will be given thereto to other departments and agencies conducting security programs except under procedures prescribed by the Secretary of the Army. The release of information derived from Federal Bureau of Investigation or military sources pertaining to investigations of National Guard personnel is governed by procedures established by the Assistant Chief of Staff, G-2, Department of the Army, the Federal Bureau of Investi-

gation, and the Chief, National Guard Bureau. Such information will not be furnished to any State adjutant general or other National Guard personnel not on active Federal service.

• • •

SECTION II

Standard and Criteria

12. Standard. The standard for appointment, enlistment, voluntary call to active duty, or retention in a regular duty status within the Army Establishment will be that, based upon all the available information, it is determined that the appointment, enlistment, voluntary call to active duty, or retention in a regular duty status (par. 9) is *clearly consistent* with the interests of national security. The standard for retention within the Army Establishment on indefinite assignment to specially controlled duties (par. 10) for inductees only will be that retention in such an assignment is *not inconsistent* with the interests of national security.

13. Criteria for application of standard. a. *Sensitive and non-sensitive positions.* An officer or warrant officer of the Army holds a sensitive position by virtue of his commission or warrant regardless of the duties and responsibilities of his assignment. (This provision does not constitute authority for initiation of action to obtain a security clearance under SR 380-160-1.) Nothing herein will preclude the use of assignment to specially controlled duties as a security measure; however, indefinite assignment to such duty in lieu of action under these regulations is not authorized. Upon receipt of a completed investigation, commanders must initiate the action prescribed in paragraph 27 on persons temporarily assigned to specially controlled duties for security reasons.

b. *Criteria.* The ultimate determination of whether acceptance or retention within the Army Establishment of the person concerned is warranted must be an overall common-sense one based upon all available information. The activities and associations listed below, whether current or past, while not all inclusive, are of varying degrees of seriousness, and warrant initiation of action to effect such determination.

(1) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with or aiding or abetting another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(2) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with any espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of the Government of the United States by unconstitutional means.

(3) Advocacy of force or violence to overthrow the Government of the United States, or of the alteration of the form of the Government of the United States by unconstitional means.

(4) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of Government

of the United States by unconstitutional means (see SR 600-220-11). (An organization, movement, or group, officially designated by The Attorney General of the United States pursuant to Executive Order 10450, shall be presumed to be subversive until the contrary has been established.)

(5) Performing or attempting to perform his duties, or otherwise acting, to serve the interests of another government in preference to the interests of the United States.

(6) Failure or refusal to sign the loyalty certificate DD Form 98; pleading protection of the Fifth Amendment or of the Uniform code of Military Justice, Article 31, in refusing to answer completely the questions contained in DD Form 98, DD Form 390, DD Form 398, or other related forms; pleading protection of the Fifth Amendment or of the Uniform Code of Military Justice, Article 31, or otherwise failing or refusing to answer any pertinent question propounded in the course of an official investigation, interrogation, or examination, conducted for the purpose of ascertaining the existence or extent, or both of conduct of the nature described above and below.

(7) Participation in the activities of an organization as a front for an organization referred to in (4) above, when his personal views were sympathetic to the subversive purpose of such organization.

(8) Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purpose.

(9) Participation in the activities of an organization referred to in (4) above, in a capacity where he should reasonably have had knowledge of the subversive aims or purposes of the organization.

(10) Sympathetic association with a member or members of any organization referred to in (4) above. (Ordinarily, this will not include chance or occasional meetings, or contacts limited to normal business or official relations.)

(11) Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to above. A close continuing association may be considered to exist if the individual lives at the same premises as, frequently visits, or frequently communicates with, such persons.

(12) Close continuing association of the type described in (11) above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

(13) Any facts other than as set forth in c below which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security. Among matters which should be considered in this category would be the presence of a spouse, parent, brother, sister, or offspring in a nation, a satellite thereof, or an occupied area thereof, whose interests are inimical to the interests of the United States.

• • •

d. *Proscribed organizations.* A list of organizations designated by The Attorney General is set forth in SR 600-220-11. Membership, past or present, or affiliation or sympathetic association with an organization so designated is but one factor to be considered in making a determination in a particular case. In determining whether affiliation with a cited organization warrants further investigation, all facts bearing on the case must be considered including the date, term, and extent of affiliation, the age and circumstances of the individual at the time, the type of organization and its status at the time in question, and the military

service and overall performance of duty of the individual concerned. Careful consideration of all these factors, particularly in the absence of any other derogatory information, may indicate that the initiation of a complaint type investigation is not warranted.

SECTION III

ADMINISTRATIVE PROCEDURES

* * *

d. No applicant will be appointed or enlisted without the specific approval of the Secretary of the Army if his separation from previous service indicates that he was relieved from active duty or discharged either as a security risk or for reasons other than security while undergoing investigation under the provisions of these regulations or of corresponding security regulations issued by the other military departments. AR 615-120 applies with respect to former members of the armed services seeking enlistment or re-enlistment in the Army.

* * *

19. Type of discharge. a. Where the approved findings of the Army Review Board indicate that a member of the Army Establishment should not be retained under the standards and criteria prescribed in these regulations he will be discharged and the character of the discharge will, except as prescribed in paragraph 17, be predicated upon the gravity of the reasonably substantiated information in derogation. The general premise with respect to characterization of separation as set forth in paragraph 17b is applicable to all categories of personnel (par 3b). Regular Army officers with over 3 years' service as such will be furnished a discharge authorized by section 106, Army and Air Force Vitalization and Retirement Act of 1948 (61 Stat. 1082; 10 U. S. C. 585).

b. The Report of Separation From the Armed Forces of the United States (DD Form 214) of members discharged under the provisions of these regulations will indicate in item 8: "AR 604-10 SPN 82." The letter of separation and/or discharge certificate of officer and enlisted reservists not on active duty will indicate: "AR 604-10 applies." Members relieved from active duty or discharged prior to completion of an action under these regulations will have "Paragraphs 9 and 20 (as appropriate), AR 615-120 applies" entered in item 38, DD Form 214.

• • •

21. Notification to other agencies. In accordance with SR 615-180-1 the Director, Federal Bureau of Investigation, the Chairman of the United States Civil Service Commission, and the appropriate local Selective Service Board will be furnished information of the identity of all persons rejected for induction for security reasons. The Assistant Chief of Staff, G-2, Department of the Army, will inform the Director, Federal Bureau of Investigation, the Chairman of the United States Civil Service Commission, and the Director, Selective Service System, of all persons denied appointment or enlistment or discharged from the military service as security risks.

• • •

SECTION V

Disposition of Cases

29. General. a. Upon receipt of a case with appropriate recommendation from the Assistant Chief of Staff, G-2, Department of the Army, The Adjutant General will—

• • •

(2) Refer all other cases to a Department of the Army Screening Board for review and recommendations.

• • •

30. Department of the Army Screening Board. A Screening Board composed of a minimum of three field grade officers operates at Department of the Army level. This Board will review all cases received from The Adjutant General, will determine what further action should be taken, and will, except for cases covered by paragraph 31a, return the case to The Adjutant General with a recommendation for such of the following actions as are appropriate:

• • •

c. Initiation of action under MCM 1951, chapter VII, when it appears that there is sufficient evidence to warrant trial, and provided release of such evidence in open court has been authorized by the Assistant Chief of Staff, G-2, Department of the Army.

• • •

31. Follow-up of Screening Board recommendations.

• • •

b. *Action to continue the case.* When the Screening Board recommends action other than to close the case, The Adjutant General will notify the appropriate staff activity and/or field command of action desired. If elimination action or indefinite assignment to specially controlled duties is recommended under these regulations, The Adjutant General will initiate action as indicated in c below.

c. *Letter of Allegations.* Upon receipt of a Screening Board recommendation to initiate elimination action or to indefinitely assign the member to specially controlled duties, The Adjutant General, based on information furnished by the Assistant Chief of Staff, G-2, Department of the Army, will, in conjunction with the Judge Advocate General, prepare a "Letter of Allegations." The "Letter of Allegations" will cite the derogatory allegations against the respondent in sufficient detail to enable him to prepare his defense and will be as complete as security considerations permit. The case together with the "Letter of Alle-

gations" will be transmitted to the appropriate field command for dispatch of the letter to the respondent. Whenever practicable, the field commander will have the letter delivered in person to the respondent concerned and obtain receipt therefor. If personal delivery is not practicable, delivery will be by registered mail and a return receipt "addressee only" will be required. The following additional procedure will apply with respect to members of the National Guard not on active duty: The "Letter of Allegations" will be forwarded direct to the respondent by the Chief, National Guard Bureau (par. 6 applies); the Chief, National Guard Bureau, will forward a copy of the "Letter of Allegations" to the major commander concerned citing the date of dispatch to the respondent; the respondent will acknowledge receipt of the "Letter of Allegations" to the major commander concerned and will make his reply to the major commander concerned; The Adjutant General will forward the case direct to the major commander concerned. The "Letter of Allegations" will refer specifically to these regulations and will inform the respondent that—

(1) He may, in lieu of appearance before a board, rebut the letter in writing within 15 days of receipt and submit such documents as he may desire. Reasonable extension of time may be granted by the field commander.

(2) He may, within 5 days of receipt, request retirement, if eligible, or if an officer, he may tender his resignation, or if an enlisted man, he may request discharge in lieu of further proceedings. Enlisted men who are required to show cause why they should not be retained on specially controlled duties will not be permitted to submit a request for discharge. A member tendering his resignation or requesting discharge must agree to accept discharge of the character specified in the "Letter of Allegations." Final decision as to type of discharge to be

awarded rests with the Department of the Army. A form letter to accomplish the tender or request will accompany each "Letter of Allegations" dispatched.

(3) He may, within 5 days of receipt, request a personal appearance hearing before a "field board" with or without counsel, and if a reservist not on active duty, such appearance will be at his own expense. He will be furnished a military counsel and may select such counsel, if the individual selected is reasonably available. Civilian counsel, if desired, will be at his own expense. The Board will assist him in procuring witnesses who are reasonable available but he will not be entitled to reimbursement for expenses incurred incident to their appearance.

(4) He will elect in writing one of the choices offered in (1), (2), or (3) above. Should he refuse to elect one of the choices offered, he will be advised that his case will be processed to completion and adjudicated by the Department of the Army without any further referral to him. He will be advised also that such adjudication may result in an other than Honorable, General, or Undesirable Discharge.

d. *Follow-up of letter of allegations.* Upon receipt of the respondent's reply to the "Letter of Allegations" or upon expiration of 15 days following receipt of the letter by the respondent, whichever is sooner, the appropriate field commander will take action to refer the case to a field board of inquiry (if requested by the respondent) or to forward the case together with respondent's reply, if any (where appearance before a board of inquiry is not requested), to The Adjutant General with recommendation of action to be taken. The Adjutant General will refer the complete case together with recommendations of appropriate field commanders to the Army Review Board for final review in accordance with paragraph 33.

• • •

33. Department of the Army Review Board. a. Upon receipt of a case with recommendations of the field board of inquiry and approprate field commanders together with aditional comments, if any, from the respondent, or upon the expiration of 10 days plus normal mailing time to and from the respondent following his receipt of transcript of the "Field Board" actions, whichever is later, The Adjutant General will refer the case to the Army Review Board for final review and recommendation.

• • •

e. The Review Board will direct one of the actions indicated in paragraph 32c(7), to include the type of discharge when appropriate, except that when the Review Board decision is to discharge a Reserve officer on active duty or a Regular Army officer with less than 3 years' service as such, the Board will submit the case to the Secretary of the Army for final approval.

f. The decisions of the Review Board, and where applicable, of the Secretary of the Army, will be transmitted to The Adjutant General for necessary action.

• • •

35. Action following final review. The Adjutant General will notify the appropriate field commander of final action to be taken. In cases concerning members of the National Guard not on active duty, the Chief, National Guard Bureau, will be informed of such action.

a. If it is determined that retention of the member is warranted under the standards and criteria prescribed in these regulations, The Adjutant General will close the case favorably as indicated in paragraph 9, and direct the major commander to notify the member in writing and to remove flagging action in accordance with AR 600-31. All information pertinent to the case will be removed from the field military 201 file of the individual concerned.

b. If it is determined that indefinite assignment to specially controlled duties is consistent with the interest of national security, The Adjutant General will direct the major commander to notify the member in writing. Flagging action will be continued in accordance with AR 600-31.

c. If retention of the member is not warranted under the standards and criteria prescribed by these regulations The Adjutant General will direct the discharge of the member from any and all military statuses he may hold, including type of discharge to be furnished. Flagging action will be removed by the Department of the Army in accordance with AR 600-31.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 141

HOWARD D. ABRAMOWITZ,
Petitioner,

v.

WILBUR M. BRUCKER,
Respondent.

PETITIONER'S REPLY BRIEF

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IN THE

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October Term, 1957

No. 141

HOWARD D. ABRAMOWITZ,

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v.

WILBUR M. BRUCKER,

Respondent.

PETITIONER'S REPLY BRIEF

I

In his brief to this Court respondent places sole reliance on two jurisdictional issues: first, whether military discharges are subject to review by a United States Court and, second, whether, assuming reviewability, petitioner has suffered injury cognizable in the courts. Respondent evidently concedes that if petitioner has in fact been injured, such injury cannot be legally justified.

We believe it abundantly clear that there is jurisdiction in a United States Court to review the action of the respondent in issuing the discharge here under consideration and, further, that petitioner has been severely injured thereby. In view of respondent's position, it will not be necessary to argue further the constitutional defects in the regulations under consideration.

II

As we understand it, respondent asserts that even when the military is charged with violation of the constitutional or statutory rights of a member of the Armed Forces, a court of the United States has no authority at all to review the action of respondent. To reach this conclusion, respondent argues that Congress has traditionally left the establishment of types of discharge to the military (Res. Br., pp. 22-34); that the Congress has never given the District Courts jurisdiction to review discharges (Res. Br., pp. 34-42); and that "the courts have recognized the limitations upon their authority" (Res. Br., pp. 42-58).

The alleged "recognition" by the courts that they have no such authority is by no means universal. In this very case, for example, the Court of Appeals of the District of Columbia considered and decided the constitutional question on its merits but, inexplicably, refused to consider the statutory question at all (see opinion in *Harmon* case below, 243 F. 2d 613, at 619-622, 627). And as we shall see, the same court, in *Lamb* v. *Patterson*, 154 F. 2d 319 (C. A. D. C., 1946; reversed on other grounds, *Patterson* v. *Lamb*, 329 U. S. 539) held that it *had* jurisdiction to review a discharge. And see also *Levin* v. *Gillespie*, 121 F. Supp. 726 (N. D., Calif., 1954), and *Bernstein* v. *Herren*, 136 F. Supp. 493 (S. D. N. Y., 1955) reversed on other grounds, 234 F. 2d 434 (C. A. 2, 1956).

The right to a judicial review arises, not from any Act of Congress (but see pp. 8, 9, *infra*) but from the constitutional limitations on the power of *any* administrative officer to act in excess of his constitutional and statutory power. If such limitations do restrict the military, they must be enforced by the United States courts, since power to enforce them cannot exist elsewhere in our constitutional scheme. See our original brief, pp. 8-10; see also *Jones* v. *Securities and Exchange Commission*, 298 U. S. 38; *Inter-*

mountain Rate Cases, 234 U. S. 476; *Crowell* v. *Benson*, 285 U. S. 22. The rule is thus stated in the last mentioned case, at pp. 56, 57:

> "• • • The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

III

In support of his contention, respondent places principal reliance on *Patterson* v. *Lamb*, 329 U. S. 539 (Res. Br. p. 42); *United States ex rel. French* v. *Weeks*, 259 U. S. 326, and *United States ex rel. Creary* v. *Weeks*, 259 U. S. 336 (Res. Br., pp. 47, 48); *Orloff* v. *Willoughby*, 345 U. S. 83 (Res. Br., pp. 49 and 50) and *Reaves* v. *Ainsworth*, 219 U. S. 296 (Res. Br., p. 46).

Patterson v. *Lamb*, *supra*, is the only one of the cases cited in which it was argued that a court had no power to review the action of the War Department in fixing the type of discharge and, as the respondent notes (Br., p. 42), this Court expressly reserved that question, deciding the case on other grounds. However, the Court of Appeals in the *Lamb* case held that it had the power to control, by mandamus, the issuance of a discharge certificate. The Government argued there (as it does here) "that it rests in the sound discretion of the Secretary of War

whether to issue a certificate of honorable discharge * * * " (154 F. 2d 319, at 323); the Court of Appeals differed, holding that under the circumstances mandamus would issue to compel the issuance of an honorable discharge.

In view of the action of this Court in reserving the question, the case cannot be claimed as Supreme Court authority for petitioner's position, but certainly it cannot be cited in support of the respondent. Respondent places much reliance (Br., pp. 44-45) on a footnote to this Court's decision in *Patterson;* the cases cited therein merely apply the familiar rule that courts will not interfere with the valid exercise of administrative discretion.

In *United States ex rel. French* v. *Weeks, supra,* and *United States ex rel. Creary* v. *Weeks, supra,* petitioners sought judicial review of a finding, made after full administrative hearing, that petitioners should be discharged "due to [their] neglect, misconduct, and avoidable habits." French claimed that the President had erroneously delegated to the Secretary of War his power to approve such discharges. Creary made the same argument but also claimed that he had been denied a hearing by an administrative appeals board within the Army.

This Court found that the President's power could be delegated to the Secretary of War and that Creary had received a full hearing. The Court said (in *French,* at p. 335) that the action by the military tribunals was "within the scope of the power with which they are invested by law" and (in *Creary,* at p. 343) that "the boards which acted on [Creary's] case did not exceed the powers conferred upon them." These cases have no bearing here, where it is claimed that the military authorities acted in excess of their powers under the Constitution and applicable statute. Furthermore, both French and Creary raised objections only to the procedure followed in their cases; neither objected as does petitioner to the substance of the discharge.

In *Orloff* v. *Willoughby, supra,* question was raised as to the statutory power of the Army to induct the plaintiff under the Doctors Draft Act while at the same time denying him a commission. This Court held that the law did not require that persons inducted under the said Act be granted a commission, and that the granting or withholding of commissions was a matter within the jurisdiction of the military, in the absence of statutory direction. That this holding was merely one of statutory construction is clear from subsequent events. Five months after the decision in *Orloff*, the statute was amended to require the issuance of commissions to persons inducted under the Doctors Draft Act. Act of June 29, 1953, 67 Stat. 86. The Army, in the face of the amended law, still refused to give commissions to doctors whom it considered security risks. In *Nelson* v. *Peckham*, 210 F. 2d 574 (C. A. 4, 1954), the Court of Appeals held that it could review the refusal of the Army to comply with the requirements of the statute and directed that the plaintiff be commissioned or discharged. The government did not appeal. And only a few days ago the final chapter in this story was written when the Court of Claims awarded Dr. Nelson back pay for the period during which he was improperly paid as a non-commissioned soldier. *Nelson* v. *United States*, Ct. Cl. No. 470-56 (December 4, 1957).

In this setting, the *Orloff* case can hardly be cited as authority for the proposition that a court may never review administrative action by the Army; the Court of Appeals for the Fourth Circuit and the Court of Claims obviously think otherwise.

That leaves *Reaves* v. *Ainsworth, supra,* "virtually alone in its harsh grandeur".[1] The *Reaves* case did not involve review of the character of a discharge—indeed, the

[1] Jones, "Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges," 57 Col. L. Rev. p. 917, at 962 (November, 1957).

plaintiff there had received an honorable discharge. It does, however, contain the broad language quoted by the respondent and referred to on occasion both by this Court and by lower Federal Courts in subsequent cases. The court there said at p. 305:

> "To those in the military and naval service of the United States, the military law is due process."

We think the decision in the *Reaves* case was a cruel one on its facts and an unwise one on the law. Whatever may have been its validity in the days when the peacetime army of the United States was a small compact unit of professional soldiers, its broad holding should not be applied to the totally different situation in which we find ourselves today. Today our Armed Forces consist of three million men on active duty, and many millions more, like petitioner, in the Reserves. Almost all of this personnel were inducted involuntarily. Almost all of its members leave as soon as their period of service has been concluded. It may be that a professional soldier who voluntarily chooses to spend his life in a military society subject to the military law thereby loses some of the rights which citizens generally possess. It may be doubted, however, whether even under such circumstances a soldier could constitutionally be punished for pre-induction conduct and, indeed, as we pointed out in our original brief (at pp. 34, 35), the Army has traditionally held that a discharge is measured by a man's service record and not by his pre-service record.

But whatever may have been the status in 1910 of the professional army man, the rules applicable to him cannot with justice be applied to the members of a vast citizen army.

The rule urged here would give the Army a degree of censorship over the political activities of all young men prior to their induction. The Army further claims, in cases

now being processed administratively, the right to give undesirable discharges to men in the Inactive Reserves on the basis of their political activity *after* separation from active service.[2] If this position is a valid one, the Army will be able to exert censorship over the political activities of the first thirty years of a man's life. The threat to the civil liberties of the individual and to the integrity of our democracy arising from such a degree of military influence over our political life can hardly be overstated. The evils described in the majority opinions in *Sweezy* v. *New Hampshire*, 254 U. S. 234, 250, 261, appear quite insignificant by comparison.

None of this could have been foreseen by the Court at the time of the *Reaves* decision. As a matter of fact, courts have refused to comply with the hard rule of the *Reaves* case at least as often as they have followed it. See *Burns* v. *Wilson*, 346 U. S. 137; *Shapiro* v. *United States*, 69 F. Supp. 205 (Ct. Cl. 1947); *Lamb* v. *Patterson*, 154 F. 2d 319 (C. A. D. C. 1946); *Nelson* v. *Peckham*, *supra*; *Nelson* v. *United States*, *supra*.

The respondent cites many additional cases, none of which deal with the review of a discharge (except *Gentila* v. *Pace*, 193 F. 2d 924 (C. A. D. C. 1951), cert. den. 342 U. S. 943). Almost all of these cases stand for the familiar proposition that a court will not review the action of an administrative officer within the area of his discretion. This, of course, is not a new principle, nor is it confined to the operation of the military. The cases cited do not bear on the question of whether a court has jurisdiction to determine whether in fact an administrative officer has acted within the bounds of permissible discretion, or in excess of his statutory and constitutional power.

Gentila v. *Pace*, *supra*, was discussed in our original brief, p. 11, footnote 4.

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[2] And, of course, AR 604-10 by its terms applies to men in the Reserves.

IV

The respondent devotes much of his brief to establishing that Congress never gave the District Court jurisdiction to review military discharges. It is more significant that Congress has never expressly denied such jurisdiction to the District Courts. This being so, the courts may exercise their general jurisdiction under 28 U. S. C. 1331, and under D. C. Code Sections 11-305 and 11-306.

There are only two statutes that have any bearing on this matter. The first is the Servicemen's Readjustment Act of 1944, 58 Stat. 286, 38 U. S. C. 693h, which created the Army Discharge Review Board. That statute contains a "finality" clause similar to that discussed by this Court in *Heikkila* v. *Barber*, 345 U. S. 229, 233. It is well settled that a proviso of this kind is ambiguous and inconclusive as regards the availability of judicial review. Even if Congress had intended to preclude judicial review it could not have done so. "Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." *St. Joseph Stockyards Co.* v. *United States*, 298 U. S 38, 52.

The other relevant statute is the Legislative Reorganization Act of 1946 (60 Stat. 812) and its amendment in 1951 (65 Stat. 655). Prior to 1946, Congress had been in the practice of passing private bills to change the character of military discharges. When the Legislative Reorganization Act was passed, Congress created boards for the correction of military records (60 Stat. 837, 5 U. S. C. 191a). As the Attorney General has said, these boards were designed to provide an administrative substitute for the burdensome private bills theretofore considered by Congress (40 Op. Atty. Gen. 504, 506, 508).

Originally the statute contained no finality clause. In 1951 Congress considered amendments to the statute and the bill introduced into the House contained a specific provision barring review "including review by the courts of the United States". (H. R. 1181, 82nd Cong., 1st Session; see Hearings on H. R. 1181 before subcommittee of House Committee on Armed Services, Subcommittee #3, May 3, 1951, p. 353). The House Subcommittee recommended the elimination of the finality clause "so that under appropriate circumstances the courts of the United States might review these matters" (H. R. Rep. No. 449, 82nd Cong., 1st Session, p. 3). This was the result of much concern expressed by members of the subcommittee that rights might be cut off by the bill in its original form (see Hearings on H. R. 1181, *supra*, pp. 369, 377, 391-93, 398). The bill passed both House and Senate; no finality language appears in the final version (5 U. S. C. 191a; recodified as 10 U. S. C. 1552).[3]

Far from indicating a desire to bar judicial review, the legislative history shows a clear Congressional intent to permit the courts to review action of the Board for the Correction of Military Records in refusing petitioner's application. (R. 21)

V

Respondent next argues that petitioner does not present a justiciable case because of his inability to show injury. In our original brief, at pages 13 to 20, we pointed out the extensive injury petitioner has suffered and further noted that the Court has frequently in recent years noted the highly prejudicial effect flowing from government action taken on grounds of doubtful loyalty. We further called the attention of the Court to the form letter sent by the

[3] A complete discussion of the legislative history of this Act is contained in Jones "Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges," 57 Col. L. Rev. p. 917, at 967 (November, 1957).

Army to persons against whom charges are made, which concedes that the serviceman who receives an undesirable discharge "may be deprived of many rights as a veteran under both federal and state legislation * * * may expect to encounter substantial prejudice in civilian life * * *" (Pet. Br., p. 17). We noted further the Navy's Regulation to the same effect (footnote 8, p. 17). To this may be added the Air Force Regulations (AFR 39-10), which candidly state:

> "Sec. 8 * * * the type of discharge an airman receives may significantly affect the person's eligibility for benefits under laws administered by the Veterans Administration, eligibility for reenlistment and acceptability for employment in civilian industry. * * *
>
> "[Sec. 8]b. * * * An undesirable * * * discharge may militate severely against an airman in seeking post-service employment, and may render him ineligible for entrance into colleges and other educational institutions."

Respondent ignores all of this and persists in his argument that such discussion about injury in these circumstances is merely "generalizations about deprivations of civil rights" (Res. Br., p. 59). The military has not always spoken in those terms. As we noted in our original brief, at pages 18 to 28, this subject has been discussed by Defense Department representatives on a number of occasions at congressional committee hearings. To the instances cited in our original brief may be added the testimony by Secretary of Defense Wilson before the Senate Committee on Armed Services on March 18, 1954 (Hearings before the Committee on Armed Services, United States Senate, 83rd Congress, Second Sess. on S. 3096). Secretary Wilson presented a chart which appears opposite page 28 of the printed record of the hearings. For the convenience of the Court we have reproduced the chart

as an Appendix hereto. It sets forth an imposing list of benefits to which a veteran with an honorable discharge is entitled. Most of these benefits will accrue to petitioner only after a "review of the facts surrounding the discharge by the agency administering the benefit" (see footnote designated * in the chart which is annexed as Appendix A hereto). These rights include almost all of the important benefits which accrue to a veteran.[4]

It hardly seems necessary to argue that there is a substantial difference between the rights of the holder of an honorable discharge who is entitled to the benefits listed and those of petitioner who must first obtain a favorable exercise of agency discretion, especially when, in the circumstances shown here, there is every reason to believe that such discretion will be exercised in a manner adverse to petitioner.[5]

One additional point should be made. The Workers Defense League has submitted an *amicus* brief in the *Harmon* case which reports the result of a survey providing evidence of what everyone knows, namely, that a less than honorable discharge, given for security reasons, results in very severe economic injury. This injury cannot be dismissed with the casual comment that it is "speculative" or that it arises from "apprehension of lowered community esteem" (Res. Br., p. 59).

---

[4] There is annexed to respondent's brief a letter signed by general counsel of the Veterans Administration which appears to contradict the testimony of Secretary Wilson. We have read that letter carefully and cannot see that the statutes and other authorities cited support the conclusions reached.

[5] Respondent makes the additional point that the Veterans Administration has in fact granted benefits to petitioner. This is a bit unfair. The benefits were all granted prior to the undesirable discharge. See Appendix B to Respondent's brief.

VI

Respondent makes much of the "concession" by the petitioner (Pet. Br., p. 25, including footnote 12). We should have thought that the scope of the concession was adequately described by the footnote. We do not know whether, as an original proposition, service in the United States Army is a right, which any able-bodied citizen may enforce by court action, but we do know that the petitioner here is not asserting such right but is prepared to waive it if it exists.

It may be that the security of the nation reasonably requires that the Army have the right to discharge soldiers whom it believes, but cannot prove, to be security risk because of rumor, gossip, suspicion or hunch. It cannot be that the interests of national security require that such persons be publicly stamped as security risks and deprived of valuable rights.

This Court, however, need not decide whether the Army has an absolute right to discharge a soldier; the issue is not raised by this record.

One additional point is made in footnote 52, at page 68 of the respondent's brief, namely, that petitioner does not seek to enjoin the respondent from divulging the grounds for petitioner's discharge to persons who might inquire. We assume that the Army will act in accordance with the decision of this Court and that it will not be necessary to enforce that decree, should it be favorable to the petitioner, by contempt proceedings. If this Court holds that AR 604-10 as applied in this case is illegal and that petitioner is entitled to an honorable discharge without any adverse notation, we assume that the government's records will be corrected accordingly and that no additional injunctive order is necessary.

VII

Petitioner has nothing to add with respect to the constitutional and statutory issues raised by him, in reply to respondent's brief, other than to note one aspect of the legislative history of the Armed Forces Reserve Act of 1952 discussed at pages 28 ff. of the respondent's brief.

Congress did consider the possibility of a discharge for security reasons and no one here denies the right of the Army to discharge persons for security reasons. The issue here is whether such a discharge, based exclusively on lawful pre-induction activity can result in a less than honorable discharge. On this subject the legislative history sheds no light. We should think that had Congress intended to give to the Armed Forces such extraordinary and unprecedented power it would have said so.

CONCLUSION

The decision of the courts below should be reversed.

Respectfully submitted,

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Note

Appendix A, which follows page 13 in this brief is a copy of the page 59 ("Incidents of Discharge"), p. 59 of Docket No. 80.

--Cameraman

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1032

HOWARD D. ABRAMOWITZ, PETITIONER

v.

WILBER M. BRUCKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

On May 13, 1957, this Court granted certiorari in *John Henry Harmon, III* v. *Wilber M. Brucker,* No. 777. The broad question there presented for review is whether the discharge of a soldier from the Army for security reasons can be reviewed in the district courts. The instant case raises the same central issue and was decided by the court below on the authority of its *Harmon* decision. For this reason, the Government does not oppose the granting of certiorari herein and respectfully suggests that the cases be set down for argument together.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JUNE 1957.

U. S. GOVERNMENT PRINTING OFFICE 1957